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A TREATISE

ON THE

AMERICAN LAW

OF

VENDOR AND PURCHASER

OF

REAL PROPERTY.

BY

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AUTHOR OF A TREATISE ON ABSTRACTS OF TITLE; PRINCIPLES OF THE LAW OF REAL PROPERTY, ETC.

VOLUME I.

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HON. BENJAMIN D. MAGRUDER,

JUSTICE OF THE SUPREME COURT OF ILLINOIS,

THIS WORK IS

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PREFACE.

In presenting to the profession a second edition of this work I desire also to express my deep sense of appreciation of the favorable manner in which the first edition has been received by both the bench and bar. In many respects it was a pioneer effort, for, while the topic was old, its treatment was essentially a new venture in American legal literature. The English works, excellent in themselves, furnished little by way of suggestion and nothing of practical aid. The American land system, different from that which prevails in every other country, rendered the English precedents, in many instances, comparatively valueless, while the spirit of American law has produced such radical departures from the procedure observed on the other side of the Atlantic that the methods of the English commentators could not be employed. I may, therefore, claim for my work, however defective otherwise, the merit of originality in compilation and method of treatment.

It would seem that a subject of such importance as Vendor and Purchaser should have early engaged the pen of the legal essayist in England, where property, for many years, could hardly be said to have an existence detached from land. But while land was the highest type of property, and while the first legal treatise[1] was confined to an exposition of the manner in which it was held, it was yet not a commercial property, and the English lawyer was concerned only with the estates that could be raised with respect of it or the manner in which it might be recovered from a disseizor. It is only of late years that freedom of alienation has been permitted in England and land become a marketable commodity, and a

[1] Littleton's Tenures.

century has not elapsed since the first distinctive treatise upon this subject appeared.

About the year 1800, one, Lord St. Leonards, then, however, only plain Mr. Sugden, became imbued with the purpose of writing a book. He cast around for a subject and eventually hit upon the title with which his name has long been associated. When he had announced his purpose he was advised by judicious friends to abandon his design as the nearly universal opinion was that the work would be a failure, for the reason, that the subjects to be considered were too multifarious for one treatise. But nothing dismayed he labored on, and in 1805 the first book on the law of Vendor and Purchaser was published. A second edition was issued the year following and from thence until the year 1862 a succession of editions appeared, culminating with the fourteenth in the year last mentioned. Its depth of learning found an appreciative audience on both sides of the ocean, and in the United States it passed through no less than eight editions, the last being issued in 1873, with a valuable annotation by J. C. Perkins. To this edition the references in the present work are made.

In the year 1851 a further addition to the literature of our subject was made by an English lawyer, Mr. J. Henry Dart. His work, both in style and arrangement, was, in some respects, an improvement on Sugden. The book was well received by the English bar and passed through six editions, the last appearing in 1888. The same year of the original publication (1851) an American edition was produced under the editorship of Thomas W. Waterman. The editor's additions and annotations are interesting and valuable, but, while the work was well received, it does not seem to have displaced the earlier work of Sugden and no subsequent editions seem to have been issued.

The first work by an American writer was a thin octavo by Francis Hilliard, which was published in 1858. Mr. Hilliard's book, while not without originality, seems to have

consisted largely of abridgments of the prior works of Sugden and Dart. It does not seem to have had a large circulation and is seldom alluded to at the present time. A second, and last, edition was issued in 1868.

This, practically, completes the bibliography of the subject. It will be seen that, as a distinctive topic, it is still comparatively new, and the same difficulties that beset the first compiler are still present. The lapse of a century has not rendered the subject any less multifarious than when Mr. Sugden's friends advised against publication for that reason, and the present writer has had to wrestle with the problem of producing a work that shall be compendious, and, at the same time, adapted to convenient use by the profession. I have endeavored to present, in as compact and comprehensive form as the topics would admit, everything that seemed germane to a work which assumed to be an exposition of the relation of vendor and purchaser. On the other hand, I have endeavored to discriminate, as far as possible, between topics which, while incidentally connected with our subject, do not partake of its essential character. These latter I have excluded. The arrangement of the first edition has been retained intact, the various sub-heads seeming to follow in a sort of natural sequence. In response to numerous suggestions I have adopted the now very prevalent practice of numbering the sections seriatim from the beginning. The changes in the text are mainly by way of amplification, with the addition of a few topics that have been developed since the publication of the first edition. The citation has been largely increased by late decisions. In my treatment of the subject I have further endeavored to produce a treatise rather than a digest and while the necessary consequence has been to introduce some of my own personality I have advanced no conclusions that are not supported by authority, and in cases where doctrines are conflicting have tried to present both sides in a fair and impartial manner.

That my work shall be found altogether free from defects would be, perhaps, to expect too much. I can only say that I have brought to it a painstaking care, both in the arrangement of the text and the selection of the cases by which it is supported. In this revision I have re-examined and weighed every proposition stated, noting every change or modification made by the courts since the first edition appeared. I may further say that all of the work is my own. I have delegated nothing to others. The labor of its compilation has been a pleasant task and I present it to the profession in the hope that it may prove as acceptable as its predecessor.

Chicago, Sept. 1, 1901. G. W. W.

PREFACE TO FIRST EDITION.

The law of Vendor and Purchaser, once replete with many subtle qualifications and distinctions, has in the United States been reduced to a comparatively simple code. Restraints on alienation have been generally abolished; land is no longer held by precarious tenures; and the rules which govern the sale and transfer of real property, reflecting the enlightenment of this commercial age, have been made to conform more closely to those which prevail in other commercial transactions. Much of the simplification of this subject has been accomplished in recent years, and in this work an attempt has been made to compile the cases which illustrate the development of the distinctively American phases of the law.

In the performance of this task the author realizes the grave responsibility of the duties he has assumed. The American law of real property has passed through many changes during the brief period of our national existence, and, as yet, can hardly be said to have emerged beyond a formative period. The varying devices of state and national policy, as well as the ever-changing complications which arise in the ordinary affairs and transactions of the people, are constantly producing new combinations and presenting new features for adjustment and determination. Thus it is that old doctrines become obsolete, and new applications of legal principles must be made to meet the exigencies of the times. Uniformity in legislation and harmony in judicial construction would render light the burdens of the codifier; but, unfortunately, the spirit of national unity does not extend beyond the scheme of government, and in the enactment and interpretation of the laws which regulate and control the disposition of real property no two of the states are exactly alike.

The very flattering reception that has been accorded to the author's former efforts emboldens him to hope that this work may be equally acceptable, and with the expression of this hope he presents it for the judgment of an indulgent profession.

G. W. W.

Chicago, Feb. 1, 1890.

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THE LAW

OF

VENDOR AND PURCHASER

PART I.

THE CONTRACT OF SALE.

CHAPTER I.

THE SUBJECT-MATTER.

ART. I. THE PROPERTY.
ART. II. THE ESTATE.
ART. III. THE TITLE.

ART. I. THE PROPERTY.

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22. Easements.
23. License.
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25. Property in adverse seizin of third person.

§ 1. **Introductory.** Land, in the United States, is justly regarded as an article of commerce. It is said to represent the basis of all values and to form the foundation of all securities. Capital seeks it as an investment. Purchasers acquire it as well for the purposes of speculation and trade as for

permanent improvement or domicile. The absence of the old restrictions on alienation makes transfer easy and safe, while the vast extent of country that is open to settlement and sale, the marvelous growth of great cities and the comparative cheapness of land in all parts of the country, have all combined to build up a great traffic in real property, and, as a corollary, an extensive code of laws for its regulation.

In considering the subject of real property from the standpoint of a vendor or vendee, it will be found that, while the land is what is used and enjoyed, it is the interest in the land, or the duration and extent of the enjoyment, that actually forms the basis of a sale. The former may therefore be aptly described as the *property*;[1] the latter is covered by the comprehensive term *estate*, while the right or authority for the exercise of property rights is embodied in the term *title*. In the succeeding paragraphs of this chapter it is proposed to briefly enumerate and discuss the various subdivisions of these three elementary classes, and in the remaining chapters of the work the incidents that attach to each and the methods of their acquisition and disposal.

§ 2. **Real property generally considered.** Under the generic term "real property" is included not only land, but all rights and profits arising from or annexed to the same that are of a permanent and immovable nature. These latter are frequently classed as tenements and hereditaments. Tenement is said to be a word of greater extent than land, signifying everything that may be holden by a tenure; while hereditament, it is asserted, is still more comprehensive, including both lands and tenements, and in addition whatever may be

[1] For many years legal writers have been seeking a compendious expression that shall fully cover the *corpus*, or thing, to which proprietary rights attach, but thus far without success. The term "land" has been employed to indicate not only the soil of the earth and its increment, but also those intangible things which pass under the name of "appurtenances." But as "land" has also a definite and restricted meaning, its employment to indicate incorporeal as well as corporeal hereditaments is frequently confusing and misleading. Under a choice of difficulties I have therefore adopted a generally received colloquialism. In common speech we speak of property in a sense which indicates not only the ownership of the thing but also the thing itself, and this use of the term seems to meet the approval of the legal profession.

inherited.[2] This, however, is one of the abstractions of the medieval English lawyers, and has little meaning or significance in this country at the present time.

Land, in its legal signification, comprehends the entire ground or soil of the earth, together with its produce or increment, as vegetation, waters, etc., and has an indefinite extent upwards as well as downwards. It further includes all houses, buildings and structures standing thereon,[3] and all minerals, fossils or gases beneath the surface.[4]

For convenience of classification, real property has further been divided into what is known as *corporeal* and *incorporeal;* the former consisting wholly of substantial and permanent objects, and the latter of rights and interests annexed thereto or arising therefrom. Incorporeal property, in the sense in which that term is used in the English law,[5] finds but few examples in the United States; and, although the term is in common use, it is mainly confined to that class of rights denominated easements.

§ 3. **Land.** In its popular, but at the same time more restricted, signification, land is the solid material of the earth, without reference to the character of the ingredients of which it is composed, whether soil, rock, or other substance; and though for many purposes every species of annexation or appurtenance will be considered under the same head, yet whenever a question has arisen upon such annexations or appurtenances the foregoing definition has always been adopted by the courts, and has even found expression in direct statutory enactment. In some instances state legislatures, with a laudable but misdirected desire to simplify the law

[2] Sacket v. Wheaton, 17 Pick. (Mass.) 105; 2 Black Com. 17; 1 Prest. Est. 12; Canfield v. Ford, 28 Barb. (N. Y.) 336.

[3] Sudbury v. Jones, 8 Cush. (Mass.) 189; Dooley v. Crist, 25 Ill. 551; Green v. Armstrong, 1 Denio (N. Y.) 554.

[4] Kier v. Peterson, 41 Pa. St. 362; Caldwell v. Fulton, 31 Pa. St. 475; Adams v. Briggs Iron Co. 7 Cush. (Mass.) 361; 2 Black. Com. 18; Mott v. Palmer, 1 N. Y. 569. The legal maxim being "*cujus est solum, ejus est usque ad coelum.*" Broom, Leg. Max. 289.

[5] Under this term was included advowsons and rents, which were held to be of a real nature. Offices exercisable within certain places, though not annexed to land, were said to savor of the realty; and dignities or titles of honor, having been originally annexed to land, were also considered as real property.

and codify elementary principles, have gone so far as to declare that the term "land" includes not only lands, tenements and hereditaments, but all rights thereto and interests therein; but, as a rule, these incidents are usually covered under the generic term "real property," and the word "land" is restricted in its signification to the definition first above given.

§ 4. **Minerals.** Coal, metals, and minerals of every description, while in place, are regarded as land; but, under the system adopted in the United States, mineral deposits and seams beneath the surface may be sold and conveyed by deed entirely distinct from the surface rights. Such a procedure was impossible under the old English system of conveyancing, at least so far as unopened mines were concerned, because livery of seizin was an inseparable incident of every conveyance, and could not be had of a separate interest in land beneath the surface. Hence, notwithstanding such interests were not, in the proper acceptation of the term, rights issuing out of the land, but the very substance itself, they were usually regarded as incorporeal hereditaments.[6] But registration having taken the place of the ancient livery, there is nothing incongruous in considering a grant of the substratum a grant of land as much as a conveyance of the surface itself.[7]

The general subject of mines and mining is still in a transition stage, and the exigencies of modern methods with respect thereto are constantly developing new questions. In the old days the attention of vendors and purchasers was directed only to the surface, and, as a consequence, the adjudications of the courts related only to such matters as this contemplation involved. The owner of the surface was also the owner of everything above and below it, his dominion, or right of property, extending from the zenith to the nadir. The value of the land was usually determined by the arable qualities of the surface or its adaptability for erections thereon. But with the advancement of the science of geology and the devel-

[6] The same view has been taken in some of the states. See Arnold v. Stevens, 24 Pick. (Mass.) 109; Thompson v. Gregory, 4 Johns. (N. Y.) 81.

[7] Caldwell v. Fulton, 31 Pa. St. 475; Knight v. Indiana Coal Co. 47 Ind. 110; Marble Co. v. Ripley, 10 Wall. (U. S.) 363; Adams v. Briggs Iron Co. 7 Cush. (Mass.) 361; Riddle v. Driver, 12 Ala. 590.

opment of mechanical appliances for penetrating and working below the surface, have come great changes in the standard of values relating to land and a new adjustment of the rights which may be had and exercised therein. Now the surface may be separated from the strata beneath it and there may be as many different owners as there are strata.[8] Where the owner of land sells the iron, or coal, or other mineral contained therein, the severance becomes complete for all legal purposes and each separate layer or seam becomes invested with practically the same legal attributes and subject to the same legal incidents as the surface.[9]

A right to enter upon the lands of another and raise minerals at a stipulated price per ton, or upon any other terms which do not comprehend a sale in gross or for a round sum, stands upon a different footing, and falls strictly within the definition of an incorporeal hereditament.[10] Such a privilege confers no exclusive right and must be exercised in common with the grantor. It is much in the nature of a license, even though it be irrevocable, and is not equivalent to a sale,[11] even though it is stipulated that the privilege shall be accorded to no one else.[12] An incorporeal hereditament, however, can only be transferred by deed with all the formalities required by law for the conveyance of a corporeal right.[13]

An express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them, unless the language of the grant itself repels this construction.[14] It also involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions and of the improvement in

[8] Lillibridge v. Coal Co. 143 Pa. St. 293.

[9] Chartiers Coal Co. v. Mellon, 152 Pa. St. 286.

[10] Johnston Iron Co. v. Cambria Iron Co. 32 Pa. St. 241; Carnahan v. Brown, 60 Pa. St. 24; Melton v. Lombard, 51 Cal. 258; Ryckman v. Gillis, 57 N. Y. 68.

[11] Funk v. Haldeman, 53 Pa. St. 243.

[12] Johnston Iron Co. v. Cambria Iron Co. 32 Pa. St. 241.

[13] Thompson v. Gregory, 4 Johns. (N. Y.) 81.

[14] This is the result of the familiar maxim that, "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted." 1 Shep. Touch. 89.

the arts and sciences, but without injury to the support for the surface or superincumbent soil in its natural state.[15]

§ 5. **Growing crops.** Although growing crops are ordinarily regarded as personal property, yet as between vendor and vendee they are held to be realty, and, unless reserved, pass to the purchaser of the land as being annexed to and forming a part of the freehold.[16] Where the vendor has made a sale of all his right, title, interest and estate in the land, it is but fair to suppose that the growing crops entered into the view of the purchaser, and formed part of the consideration for the purchase price which he paid for the land; and this construction is the one generally adopted by the courts.[17]

Whether the reservation, as above indicated, must be in writing is a question upon which there seems to be some dispute; for, while the rule is undoubtedly absolute that the natural products of the earth, as trees, etc., can only be reserved in writing, it seems that grain, vegetables, and other growing crops that come within the definition *fructus industriales,* may be prevented from passing as realty by a parol reservation.[18] But this doctrine is in direct antagonism with the settled principles of law governing the construction of deeds; and if it is conceded, as it must be, that growing crops, unless reserved, pass as part of the land, and no reservation is made in the deed of conveyance, it would naturally follow that parol evidence would be inadmissible to show that an interest did not pass by the deed which the law says did pass.

A distinction is made, however, between growing crops and ripened crops, and it has been held that the rule above stated applies only where the crops are immature and have not ceased to draw nutriment from the soil at the time of sale. The ripened crop is said to possess the character of personalty and the fact that it rests upon the land unsevered is of no consequence. In such event the crop is no longer regarded

[15] Marvin v. Mining Co. 55 N. Y. 538; Wilms v. Jess, 94 Ill. 464; Turner v. Reynolds, 23 Pa. St. 199.

[16] Bear v. Ritzer, 16 Pa. St. 178; McIlvaine v. Harris, 20 Mo. 457; Gibbons v. Dillingham, 10 Ark. 9; Smith v. Leighton, 38 Kan. 544.

[17] Talbot v. Hill, 68 Ill. 106; Bull v. Griswold, 19 Ill. 631.

[18] Backenstoss v. Stahler's Adm'rs, 33 Pa. St. 251; Johnston v. Tautlinger, 31 Iowa, 502. See, *contra*, McIlvaine v. Harris, 20 Mo. 457.

as part of the realty, and hence will not pass to the purchaser of the land.[19]

§ 6. **Trees and herbage.** As has been shown, the term "land" embraces not only the soil, but its natural produce growing upon and affixed to it.[20] Trees and herbage, in place, are therefore integral parts of the realty,[21] and pass with a grant of the land.[22] Trees and shrubbery grown upon premises leased for nursery purposes would probably be held to be personal property, as between landlord and tenant; but between vendor and vendee they would pass with the land unless specially reserved. It is further necessary that such reservation, if made, shall be in writing. It is no uncommon thing in sales of improved property to make verbal arrangements, contemporaneous with the written contract, whereby a reservation is made, or attempted to be made, of fruit trees, ornamental shrubbery, etc.; but, whatever may be the rule in regard to annual crops, it seems certain that with regard to trees the reservation must be in writing, and parol proof of contemporaneous verbal agreements is inadmissible to impair the effect of a written contract.

§ 7. **Manure.** In sales of agricultural lands it is a generally accepted rule that manure lying upon the property passes to the vendee as an incident of the land,[23] unless specially reserved in the deed.[24] In a few instances a distinction has been made between manure lying in heaps in a barnyard and where it has been placed or spread upon the land,[25] the former being regarded as personalty; but this distinction, which originally was made in favor of tenants, is not generally recognized.[26] The rule as just stated, however, does not

[19] Garanflo v. Cooley, 33 Kan. 137; First Nat. Bank v. Beegle, 52 Kan. 769.

[20] Harrell v. Miller, 35 Miss. 700.

[21] Claflin v. Carpenter, 4 Met. (Mass.) 580; Rich v. Zielsdorf, 22 Wis. 544; Slocum v. Seymour, 36 N. J. L. 139; Carpenter v. Medford, 99 N. C. 495.

[22] Smith v. Price, 39 Ill. 28; Sparrow v. Pond, 49 Minn. 412; McKenzie v. Shows, 70 Miss. 388; Matter of Chamberlain, 140 N. Y. 390.

[23] Kittredge v. Woods, 3 N. H. 503; Sawyer v. Twiss, 26 N. H. 345; Goodrich v. Jones, 2 Hill (N. Y.), 142; Fay v. Muzzey, 13 Gray (Mass.), 53; Haslem v. Lockwood, 37 Conn. 500; Chase v. Wingate, 68 Me. 204.

[24] Kittredge v. Woods, 3 N. H. 503.

[25] Ruckman v. Outwater, 28 N. J. L. 581.

[26] The reason for the rule, it is said, is that it is for the benefit of agriculture that manure, which is usually produced from the drop-

apply to manure made in livery-stables, or in buildings unconnected with agricultural property and out of the course of husbandry;[27] nor even in the business of stock-raising, the stock not being fed upon the products of the land.[28] In such cases the manure is not considered as incident to the land, and does not pass by a conveyance of it.[29] Nor will the rule apply in sales of agricultural land where only a small portion of the farm is sold, although the manure happens to be piled upon that part.[30]

§ 8. **Aerolites.** We have scientific authority for the assertion that from six to seven hundred stones, presumably departures from other planets, fall annually upon the surface of the earth. In their general features they may fairly be classed as "accretions," and as such would become the property of the owner of the fee. The fact that an aerolite is, in one sense, a "lost" or "abandoned" article, does not militate against the position above taken, nor will it belong to the first finder under the general rules of law relating to personalty. Nor will the fact that it is deposited through the medium of air and not of water make it any the less an accretion, for every wind is performing the same office and removing particles from the land of one proprietor and depositing them on that of another. In their original location aerolites would undoubtedly be classed as realty—integral portions of some planetary land, and by disintegration and removal through natural causes they become parts of the new location on which they fall. When in place they are as much a part of the land they rest upon as any other natural object and pass by a sale of the freehold. When severed by the owner they are not distinguishable from other stones or mineral deposits.[31]

pings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such undoubtedly is the general usage and understanding; and a different rule would give rise to many difficult and embarrassing questions. Fay v. Muzzey, 13 Gray (Mass.), 53.

[27] Needham v. Allison, 24 N. H. 355; Parsons v. Camp, 11 Conn. 525.

[28] Snow v. Perkins, 60 N. H. 493.

[29] Plummer v. Plummer, 30 N. H. 558.

[30] Collier v. Jenks, 19 R. I. 137.

[31] The subject of ownership in aerolites is comparatively untouched in jurisprudence. The only case which has come under

§ 9. **Houses and buildings.** Within the term "land" are included all houses and buildings standing thereon,[32] which pass by a conveyance of the land without special mention;[33] and in all contracts for the sale and conveyance of lands the improvements resting upon or affixed to them at the time are considered as part of the purchase. On the other hand, land which is essential to the use of a building will, it seems, pass by a conveyance of the building if it appears that such was the intention of the parties.[34]

But houses and buildings are realty only while in place. A severance, *proprio vigore,* changes the character of the property from real to personal, irrespective of the means by which it may be accomplished; and, so far as the legal effect is concerned, it matters not whether the severance was by the act of God or the act of man.[35]

§ 10. **Fixtures.** A fixture has been defined by Bouvier as a personal chattel affixed to real estate, which may be severed and removed by the party who has affixed it, or by his personal representatives, against the will of the owner of the freehold.[36] The term "fixture," however, is a most uncertain title, and in many cases—possibly a majority—is used in exactly a contrary sense to the definition just given, being employed to indicate a chattel annexed to realty so as to become a part of it. Indeed, it is difficult, if not impossible, to give a definition of the term which may be regarded as of universal application, or to formulate in one rule that which will enable us to deter-

the observation of the writer is that of Goddard v. Winchell, 86 Iowa, 71, which embodies and sustains the doctrine of the text.

[32] Sudbury v. Jones, 8 Cush. (Mass.) 189; Ford v. Cobb, 20 N. Y. 344; Lipsky v. Borgmann, 52 Wis. 256.

[33] West v. Stewart, 7 Pa. St. 122; Leland v. Gassett, 17 Vt. 403; Washburn v. Sproat, 16 Mass. 449.

[34] Gibson v. Brockway, 8 N. H. 465; Moore v. Fletcher, 16 Me. 66; Wilson v. Hunter, 14 Wis. 683. In this case a mortgage described the premises conveyed as "the three-story brick building now occupied by them as a store, situated on land described as lot No. 1, in block No. 9, in the village of Whitewater." In point of fact the store not only covered lot No. 1, but also the west two feet of lot No. 10 in that block; but the court held that all the land covered by the building would pass, such being the apparent intention of the parties; and see Whitney v. Olney, 3 Mason (c. ct.) 280, where a grant of a mill was held to include the land under and adjoining same.

[35] Buckout v. Swift, 37 Cal. 433.

[36] 1 Bouv. Law Dict. 593.

mine the question as to whether given appendages or annexations to houses or lands are to be considered as part of the realty, and hence partaking of its immovable character, or simply as personal property which follows the person of the owner.

It is a rule of the common law that whatever is accessory to land is a part of it, and passes by alienation. The necessities of trade have caused a modification of this rule so far as it may affect the relation of landlord and tenant, and courts recognize and enforce the right of removal, by tenants, of chattels annexed to the freehold for the purposes of manufacture, agriculture or domestic convenience.[37] But as between vendor and vendee the rule is still applicable, except so far as it may have been modified by statutory regulation; and, where the question is not affected by the terms of the contract, appurtenances and chattels attached to lands or buildings for permanent and habitual use, and contributing to their value and enjoyment, pass by a grant of the freehold, and after conveyance cannot be severed by the vendor or any person other than the owner.[38]

Just what shall be regarded as a fixture, and what a chattel sufficient to escape the operation of the foregoing rule, is not always an easy matter to decide. Many things pass by a deed of lands, being put there by the vendor, which a tenant who had put them there might have removed; and they will pass to the vendee, although attached for the purposes of trade, manufacture, or even for ornament or domestic use. Thus, utensils and machinery appertaining to a building for manufacturing purposes;[39] gas-pipes, fittings and other apparatus

[37] It may be remarked here that very many, indeed, a large proportion, of the cases involving questions as to whether particular articles were fixtures have arisen between landlord and tenant; and, from the very nature of the relation between these parties, as well as from the widely differing circumstances attending each case, has come the difficulty of settling and establishing a universal rule. But the cases between vendor and vendee are less difficult as well as numerous, and, with respect to this relation, the rule is better settled.

[38] Tourtellot v. Phelps, 4 Gray (Mass.), 578; Kennard v. Brough, 64 Ind. 23; Lapham v. Norton, 71 Me. 83; Westgate v. Wixon, 128 Mass. 304; Alvord Mfg. Co. v. Gleason, 36 Conn. 86; Van Kuren v. R. R. Co. 38 N. J. L. 165; Stillman v. Flenniker, 58 Iowa, 450; Horne v. Smith, 105 N. C. 322.

[39] As potash kettles in an ash

designed for purposes of illumination,[40] including even chandeliers, burners, etc., when it is apparent that such was the intention of the parties,[41] or they are clearly shown to be accessories and not merely furniture;[42] water-pipes and conduits;[43] ranges, boilers and tanks attached in a permanent manner,[44] will all pass by a conveyance of the land without special mention. Stoves and hot-air furnaces or other appliances for heating, when put in as permanent annexations,[45] have been held to pass, though on this point the authorities are not agreed.[46] Window and door screens,[47] storm-doors, or other adjuncts made and fitted to a house, usually go with it, though if never actually used and the house is complete without them, they might not pass even if on the premises;[48] but generally anything that the vendor has annexed to a building for the more convenient use and improvement of the property passes by his deed unless specifically reserved.

§ 11. **Continued—Rule for determination.** The rule, therefore, would seem to be that where the annexation is permanent in its character and essential to the purpose for which the property is used or occupied, it should be regarded as realty and pass with the grant of the freehold; and this not-

factory (Miller v. Plumb, 6 Cow. (N. Y.) 665); a cotton-gin permanently fixed (Bratton v. Clawson, 2 Strob. (S. C.) 478); a steam-engine to drive a bark-mill (Oves v. Oglesby, 7 Watts (Pa.), 106); kettles set in brick in a print-works (Despatch Line v. Bellamy Mfg. Co. 12 N. H. 207); iron stoves fixed to the brick-work of chimneys (Goddard v. Chase, 7 Mass. 432); fixed tables in a mill (Sands v. Pfeiffer, 10 Cal. 259); blower and pipe conveying air to a forge (Alvord Mfg. Co. v. Gleason, 36 Conn. 86); a factory bell (*Ibid.*, and Weston v. Weston, 102 Mass. 514); heavy iron table in a glass factory (Smith Paper Co. v. Servin, 130 Mass. 511); an iron drill fastened by screws and braces (Savings B'k v. Stephens Tool Co. 130 Mass. 547).

[40] McKeage v. Ins. Co. 81 N. Y. 38; Hays v. Doane, 11 N. J. Eq. 96. *Contra*, Vaughn v. Haldeman, 33 Pa. St. 522.

[41] Fratt v. Whittier, 58 Cal. 126; Keeler v. Keeler, 31 N. J. Eq. 191; and see Johnson v. Wiseman, 4 Met. (Ky.) 359; Smith v. Commonwealth, 14 Bush (Ky.), 31.

[42] Keeler v. Keeler, 31 N. J. Eq. 191.

[43] Philbrick v. Emry, 97 Mass. 134.

[44] Fratt v. Whittier, 58 Cal. 126.

[45] Goddard v. Chase, 7 Mass. 432; Blethen v. Towle, 19 Me. 252; Stockwell v. Campbell, 39 Conn. 362.

[46] See Towne v. Fisk, 127 Mass. 125.

[47] Petengill v. Evans, 5 N. H. 54; Fratt v. Whittier, 58 Cal. 126.

[48] Peck v. Batchelder, 40 Vt. 233.

withstanding the connection between them may be such that it may be severed without physical or lasting injury to either.[49]

The mode of annexation, while of controlling efficacy as between landlord and tenant, and possibly between executor and heir, is of comparatively small moment as between vendor and vendee—the purposes of the annexation and the intent with which it was made being, in most cases, the important consideration.[50] Physical annexation is not indispensable provided the article is of an accessory character, and in some way in actual or constructive union with the principal subject,[51] and not merely brought upon it.[52] It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty;[53] and even in case of a less thorough method, the manner of attachment may still afford convincing evidence that

[49] Green v. Phillips, 26 Gratt. (Va.) 752; Smith v. Commonwealth, 14 Bush (Ky.), 31; Parsons v. Copeland, 38 Me. 537; Keeler v. Keeler, 31 N. J. Eq. 191; Bishop v. Bishop, 11 N. Y. 123; Pea v. Pea, 35 Ind. 387; Philipson v. Mullanphy, 1 Mo. 620; Cohen v. Kyler, 27 Mo. 122; Wadleigh v. Janvrin, 41 N. H. 503; Corliss v. McLagin, 29 Me. 115; Bringhoff v. Munzenmaier, 20 Iowa, 513. Ponderous articles, although only annexed to the land by the force of gravitation, if placed there with the manifest intent that they shall remain, may be fixtures. Wolford v. Baxter, 33 Minn. 12.

[50] McRea v. Bank, 66 N. Y. 489; Wheeler v. Bedell, 40 Mich. 693; Richardson v. Borden, 42 Miss. 71; Eaves v. Estes, 10 Kan. 314; Leonard v. Stickney, 131 Mass. 514; Close v. Lambert, 78 Ky. 229; Thomas v. Davis, 76 Mo. 72; R. R. Co. v. Morgan, 42 Kan. 23.

[51] A thing may be said to be constructively attached where it has been annexed, but is separated for a temporary purpose, as in the case of a mill-stone removed for the purpose of being dressed; or where the thing, although never physically fixed, is an essential part of something which is fixed, as in the case of keys to a door, or loose covers to fixed kettles. It is perhaps somewhat on this principle observes Mitchell, J., that the permanent and stationary machinery in a structure especially erected for a particular kind of manufacturing has been held fixtures, although very slightly or not at all physically connected with the building, because without it the structure would not be complete for the purpose for which it was erected. Wolford v. Baxter, 33 Minn. 12; R. R. Co. v. Morgan, 42 Kan. 23.

[52] Wolford v. Baxter, 33 Minn. 12.

[53] Lyle v. Palmer, 42 Mich. 314; Warner v. Kenning, 25 Minn. 173. Poles adapted and used for culti-

the intention was to make the article a permanent accession.[54] Still there is no universal test; and neither the mode of annexation nor the manner of use can ever be said to be entirely conclusive, the express or implied understanding of the parties being usually the pivot on which the question turns.[55]

The greatest difficulty in the application of the rules for determining fixtures occurs in the case of what may, under ordinary circumstances, be fairly classed as furniture; as, contrivances for heating and illumination. Lamps, chandeliers and gas-fixtures, generally, are usually regarded as furniture. True, they are often sold with the house, which can hardly be said to be complete without them; but, unless there has been

vating hops on a farm have been held to be part of the realty, equally while in use and while lying piled upon the premises. Being intended for permanent use upon the land and necessary for its proper improvement, by simply being placed in heaps for a temporary purpose, they would not lose their distinctive character as appurtenant to the land. Bishop v. Bishop, 11 N. Y. 123.

[54] Wheeler v. Bedell, 40 Mich. 693; Funk v. Brigaldi, 4 Daly (N. Y.), 359.

[55] As, for instance, where the building is constructed expressly to receive the debatable articles, machinery, utensils, etc., and they could not be removed without material injury to the building; or, where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. McRea v. Bank, 66 N. Y. 489. A rule for determining whether a chattel is so annexed to the realty as to become a part of it is laid down by Bartly, J., in Teaff v. Hewitt, 1 Ohio St. 511, as follows: "From the examination I have been enabled to give this subject, and a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1, actual annexation to the realty or something appurtenant thereto; 2, appropriation to the use or purpose of that part of the realty with which it is connected; 3, the intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation was made. This criterion furnishes a test of general and uniform application—one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well-considered adjudications."

a special agreement in regard to them, they will not pass under the general clauses of the deed.[56] Mirrors are ordinarily regarded only as furniture; nor will the fact that they are fastened to the walls for safety or convenience deprive them of their character as personal chattels and make them part of the realty;[57] but if they are set in the walls, with frames corresponding to the cabinet-work, and their removal would leave the walls in an unfinished condition, the rule is otherwise.[58] Portable hot-air furnaces have been held to come within the same rule,[59] and would, doubtless, be governed by the same principles; but in this, as in every case involving the questions just discussed, the intention of permanent annexation must decide the matter; and where it appears that either gas-fixtures[60] or furnaces [61] were considered as integral parts of the realty, and as such were to pass with the buildings, effect will be given to such intention, notwithstanding no mention has been made in the deed; and, generally, in all cases of doubt, the rule for determining what is a fixture should be construed most strongly against the vendor.[62] Machinery, though essentially of a personal nature, yet when put into a building for manufacturing purposes, becomes part of the realty and passes by a conveyance; and the true criterion in such case is not whether it may be detached and removed from the premises without injury.[63]

It will, of course, be understood that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may see fit.[64] Hence, property which the law regards as permanent fixtures may be by them

[56] Vaughn v. Haldeman, 33 Pa. St. 522; Rogers v. Crow, 40 Mo. 91; McKeage v. Ins. Co. 81 N. Y. 38; Jarechi v. Philharmonic Soc. 79 Pa. St. 403.

[57] McKeage v. Ins. Co. 81 N.Y. 38.

[58] Ward v. Kilpatrick, 85 N. Y. 413.

[59] Towne v. Fiske, 127 Mass. 125.

[60] Fratt v. Whittier, 58 Cal. 126.

[61] Stockwell v. Campbell, 39 Conn. 362; Thielman v. Carr, 75 Ill. 385.

[62] Fratt v. Whittier, 58 Cal. 385.

[63] Thus the wheels of a mill, the stones and even the bolting cloth are parts of the mill and of the freehold, and cannot be levied on as personal property (Gray v. Holdship, 17 S. & R. (Pa.) 413; while the mill chains, dogs and bars, being in their appropriate places at the time of conveyance, have been held to pass by a deed of the mill. Farrar v. Stackpole, 6 Greenl. (Me.) 154.

[64] Fratt v. Whittier, 58 Cal. 126; Bartholomew v. Hamilton, 105 Mass. 239.

considered as personal chattels, and that which, in contemplation of law, is regarded only as personalty they may regard as a fixture; and, whatever may be their agreement, courts will enforce it.[65] If the deed is silent in respect to same, or conveys only the realty and its appurtenances, the prior agreement is competent to show intention and fix the character of annexations. On the contrary, if the deed mentions specific fixtures and personal property, none other, as a rule, will pass thereby.[66]

But while the agreement of parties may, to a certain extent, supersede the general rule of law, such agreements cannot be made to injuriously affect the interests of third parties who buy without notice. A purchaser of realty, in the absence of notice to the contrary, has a right to presume that he takes the estate with every appurtenance which, under the general rules of law, passes by a grant of land.[67] As to him every permanent improvement or annexation to the land becomes a

[65] Smith v. Waggoner, 50 Wis. 155.

[66] It is not contended that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character. Ford v. Cobb, 20 N. Y. 344; Eaves v. Estes, 10 Kan. 314; Coleman v. Lewis, 27 Pa. St. 291; Hunt v. Iron Co. 97 Mass. 279; Richardson v. Copeland, 6 Gray, 536; Haven v. Emery, 33 N. H. 66.

[67] Hopewell Mills v. Bank, 150 Mass. 519; Tibbets v. Horne, 65 N. H. 242; Union etc. Ins. Co. v. Tillery, 152 Mo. 421. As where a party, under a parol permission or a license, places upon the land of another a permanent improvement, with the right, when he desires, to enter and take it therefrom, he may exercise that right at any time before the permission or license is revoked by the landowner, and probably would have the right to enter and remove the fixture within a reasonable time after the revocation, and it would seem that any subsequent vendee, who purchased the land with notice of such parol agreement or license, and of the interest of the parties in the fixture, would be bound by such agreement. But this is the limit of the doctrine, and it cannot be carried to the extent of binding or affecting injuriously third parties to whom the land has been conveyed without reservation and to whose notice the parol license had not been brought. Rowland v. Anderson, 33 Kan. 264.

fixture, which cannot be withheld or removed; and though there are cases which seem to hold a contrary doctrine, they are not sustained by the volume of authority.[68]

§ 12. **Mortgaged chattels affixed to realty.** Very intricate questions will sometimes arise between vendees of realty and third persons claiming rights or equities in what are ordinarily termed fixtures. As between vendor and vendee the law is now well settled, and the same principles that apply to controversies between the parties will usually be effective as between the parties and third persons where nothing has occurred to impart notice of outstanding rights and interests. But where third persons, prior to the purchase by the vendee, have acquired substantial rights, such as would be protected and enforced were it not for the purchase, the law is not so clear. With respect to the integral parts that go to make up a building—the bricks, boards, etc.—it is doubtful whether even direct and positive notice would avail to preserve the creditor's rights or liens of third persons, except as they might be saved by a properly secured mechanic's lien; as these things, by being incorporated into the building, lose their individuality and identity, and become absorbed in and made a part of the realty rather than a simple annexation to it. With respect to ponderous and bulky articles, or articles which, after annexation, still preserve their original form and identity, and are capable of severance, a different rule would seem to prevail. Articles of this kind are legitimate subjects for fixtures, and are of that class of property about which the law permits parties to contract so as to control, as between themselves, their character after being affixed, making them either personal property or real estate. The mortgaging of such articles as personal property would, as between the parties and those having notice thereof, make them such. Hence it has been

[68] Haven v. Emery, 33 N. H. 66; Dostal v. McCaddon, 35 Iowa, 318; Houx v. Seat, 26 Mo. 178; Rowand v. Anderson, 33 Kan. 264; Powers v. Dennison, 30 Vt. 752; Westcott v. Delano, 20 Wis. 541. A hotel sign is a fixture and appurtenant to a hotel, so as to pass by a conveyance of the hotel and appurtenances without reservation to one who continues the business of hotel-keeping upon the premises, if such sign is attached so as to be immovable without force, and was so placed with the intent of its remaining a permanent sign for the hotel. Redlon v. Barker, 4 Kan. 382.

held that where the owner of land executes a mortgage upon chattels which may properly be made fixtures, and subsequently affixes them to the land, no person having knowledge of such facts can, by purchase of the realty or otherwise, acquire from the mortgagor any title to such chattels paramount to the lien created by the mortgage thereof.[69]

[69] Sowden & Co. v. Craig, 26 Iowa, 156; and see Denham v. Sankey, 38 Iowa, 271. In the case of Ford v. Cobb, 20 N. Y. 344, salt kettles were bought by the owner of the fee and mortgaged to the seller as personalty to secure the purchase money, and were afterward affixed to the freehold by being set in brick foundations, from which they could be removed only at an expense of $50. It was held that such salt pans retained their character as personal chattels as against the subsequent purchaser of the realty who had no notice of the chattel mortgage other than that constructively given by the filing of the chattel mortgage for record. Eaves v. Estes, 10 Kan. 314, arose between the vendee of the freehold and a chattel mortgagee, the purchaser of the freehold having no notice of the chattel mortgagee's lien. The property mortgaged was an engine put into and used as motive power in a mill. The court say: "But when we consider the purpose of the parties as evinced by the mortgage to make the engine retain the character of a chattel regardless of its attachment to the mill, and as the mortgage violated no principle of law, wrought no injury to the rights of others, and was in the interest of trade, we have no doubt that the engine continued to be personal property." But see Voorhees v. McGinnis, 48 N. Y. 278. In Tifft v. Horton, 53 N. Y. 377, the New York court of appeals held that neither a prior nor subsequent mortgagee of land can claim, as subject to the lien of his mortgage, chattels brought upon and affixed to the lands under an agreement between the owner of the fee and the owner of the chattels that the character of the latter as a personal chattel is not to be changed. Folger, J., in delivering the opinion of the court, said: "While there can be no doubt that the intention of the owner of the land was that the engine and boilers should ultimately become part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiff that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid; and as parties may, by their agreement expressing their intention so to do, preserve and continue the chattels as personal property, there can be no doubt but that, as between themselves, the agreement in this case was fully sufficient to that end." See, also, Sheldon v. Edwards, 35 N. Y. 279; Shell v. Haywood, 16 Pa. St. 523. The following cases also tend to support the doctrine of the text: Russell v. Richards, 10 Me. 429; Hensley v. Brodie, 16 Ark. 511; Crippen v. Morrison, 13 Mich. 34.

This doctrine has been expressly controverted, however, in other cases, where it has been held that, where the articles in question are actually and firmly annexed to the freehold in as permanent and substantial a manner as is usual and as is adapted to the nature and objects of their employment, though capable of being removed without injury to the building, they thereby become, and are presumed to be, a permanent accession to the freehold; and that the execution of a chattel mortgage thereon prior to annexation is not sufficient to overthrow this presumption and raise the contrary one of an intent to preserve their personal character. Hence, it is contended, such articles, becoming a part of the realty, will pass to a vendee upon his purchase of same, while the remedy of the mortgagees will be against those who wrongfully converted the personal into real property.[70] So, also, it has been held that, although the parties concerned may make a binding agreement that what would otherwise be a fixture shall be regarded as personalty, such agreement will not affect the rights of a subsequent vendee or mortgagee of the realty with-

[70] As where K., being the owner of a mill, erected a substantial building adapted to contain machinery; he placed therein a steam engine, boilers, shafting, etc.; the boilers were set in brick, while the shafting and gearing were constructed with special reference to the place, were adapted to the nature and objects of their employment, and were firmly fastened to the building, but could be removed without injury to the walls. They were put up without special intent on the part of K. either of making them a part of the freehold or of removing them at a future time. K. borrowed the money to make the improvements, giving a mortgage on the property. Soon after, the old boilers were taken out and replaced by new ones. While the new boilers were at the shop in process of construction, and a large portion of the engine was there being repaired, K. gave a chattel mortgage upon them to W., and, after the repairs were completed and the machinery in running order, gave another upon them and other property to M. After the repairs and before the last chattel mortgage he gave another real-estate mortgage upon the premises. The plaintiff acquired title upon foreclosure and sale under the two real-estate mortgages. W. and M. subsequently removed the machinery covered by the mortgages. In an action to recover possession, *held*, that the property was part of the freehold and passed to plaintiff upon his purchase. Voorhees v. McGinnis, 48 N. Y. 278; and see Pierce v. George, 108 Mass. 78; Tibbetts v. Moore, 23 Cal. 208; Curry v. Schmidt, 54 Mo. 517.

out notice of it,[71] and that the delivering and filing of a chattel mortgage upon the property which is the subject of the agreement does not constitute the required notice.[72]

The weight of authority fully supports the rule last stated; and it is believed that the wisdom of such latter rule will be manifest upon careful investigation, as being more in accordance with the policy of our laws relative to notice, registration, etc.[73]

§ 13. Chattels left upon land. It will hardly be contended by any one that detached articles, distinctively personal in their nature, left upon realty by the vendor at the time of a sale, would, by the conveyance, pass to the vendee, unless the articles were such as had been or were intended to be actually employed in connection with the land. In this latter event they might, without doing violence to any known precedent or rule of law, be properly classed as fixtures; as where poles used during the season for supporting vines were at the time of sale piled up and unemployed.[74] But generally a chattel must be actually or constructively affixed to the land to permit it to pass by a deed of the land without special mention.[75]

Hence, where wood, rails, timber, stone or other articles of a strictly personal nature are upon the land at the time of sale, they will, notwithstanding, retain their character, and, unless mentioned in special terms, will not pass by the deed.[76] The rule also seems to be settled that the title to chattel property lying upon land at the time of sale, but reserved by

[71] See Case Mfg. Co. v. Garver, 13 N. E. Rep. (Ohio) 493; Ridgeway Stove Co. v. May, 141 Mass. 557; and see Fortman v. Goepper, 14 Ohio St. 565; Hopewell Mills v. Bank, 150 Mass. 519.

[72] On the principle that an instrument, to afford constructive notice by registration, must appear among the records of interests affecting real estate, see Case Mfg. Co. v. Garver, 13 N. E. Rep. (Ohio) 493; Brennan v. Whitaker, 15 Ohio St. 446.

[73] See Powers v. Dennison, 30 Vt. 752; Hunt v. Iron Co. 97 Mass. 279; Trull v. Fuller, 28 Me. 545; Haven v. Emery, 33 N. H. 66; Prince v. Case, 10 Conn. 375; Dostal v. McCaddon, 35 Iowa, 318; Throop's Appeal, 70 Pa. St. 395.

[74] Bishop v. Bishop, 11 N. Y. 123.

[75] Woodman v. Pease, 17 N. H. 282; Peck v. Brown, 5 Nev. 81; Carpenter v. Lewis, 6 Ala. 682; Teaff v. Hewitt, 1 Ohio St. 511.

[76] Cook v. Whiting, 16 Ill. 480; Woodman v. Pease, 17 N. H. 282; Peck v. Brown, 5 Nev. 81.

the vendor from the conveyance, does not become vested in the grantee of the land by mere lapse of time and neglect of the grantor to remove it, however long continued. So long as the landowner merely suffers it to remain without demanding a removal or setting up any adverse claim, no title vests in him through delay. Even if the delay amounts to an abandonment, this does not necessarily pass title to the land-owner.[77]

§ 14. **Aqueducts, conduits and pipes.** The exigencies of modern commerce have introduced many appliances that, from the nature of their use or the manner of their construction, can properly be classed only as real property notwithstanding their apparent similitude to those things which usually pass under the name of personalty. The authorities which tend to fix the status of these appliances deal mainly with the subject on questions raised under the taxing power of the state, but are equally effective in declaring the rule which shall apply between vendor and vendee. Under the broad principle that "land" includes all increments, fixtures and tenements of every kind connected therewith and all rights thereto as well as all interests therein, it has been held that conduits and pipes used to distribute water, gas, oil, etc., partake of the nature of realty and are properly classed as such.

While such pipes are the property of the owner of the soil in or upon which they rest, no question will probably arise. In such event they may properly be regarded as fixtures, permanent in character and a part of the land which sustains them. But where they are constructed and operated by parties who have no title to the soil, or at most but a license for their occupation, their classification becomes one of doubt. In England it would seem that such property would be regarded as personalty,[78] and in this country they have in several instances been classed as chattels.[79] So far as the subject has been considered with respect to the purposes of taxation, the general tendency seems to be to regard them as realty. As to whether they are to be considered as appurtenant to the place of sup-

[77] Noble v. Sylvester, 42 Vt. 146. In this case a quantity of building stone was left upon the land, but a special reservation of same was made in the deed.

[78] Waterworks v. Bowley, 17 Q. B. (Eng.) 358.

[79] See, Commissioners v. Gaslight Co. 12 Allen (Mass.), 75; Gaslight Co. v. State, 6 Cold. (Tenn.) 310.

ply, i. e., reservoir, pumping station, power house, etc., there is some difference of opinion. The cases which so contend,[80] and yet class them as realty, seem to be founded on a wrong principle, as land cannot be appurtenant to land, nor should they be considered in the same light as house drains or erections of that character. While the question is yet one of doubt, particularly when applied to the relation of vendor and vendee, the better solution seems to be that mains, pipes, conduits, etc., in place, may be considered real property and subject to the rules which govern in this branch of the law.[81]

§ 15. **Submerged lands.** The question as to the ownership of soil covered by water, particularly in the case of navigable lakes or rivers, is one which each state is at liberty to determine for itself in accordance with its local law and public policy; and though such ownership is a right which properly belongs to them in their sovereign capacity, they have, in many instances, conceded it to the riparian proprietor. By the civil law, the soil of a navigable stream covered by water, as well as the use of the stream, belongs to the public, while the common law vested in the sovereign, for the public use, the title to the soil under all waters where the tide ebbs and flows. The doctrine of the common law, together with its test of navigability, having been found unsuitable to the wants of our large and extensively watered country has, in a majority of the states, been superseded by rules based upon the civil-law doctrine. By these rules the state retains, as a prerogative right, the title to the soil under its navigable waters, as well as the use of these waters, which it holds in a fiduciary relation for the public use. This right is usually jealously guarded by the state, and private ownership upon navigable waters has been rigorously restricted to the low-water line;[82] yet courts of high authority and undoubted learning have not hesitated to say that land under navigable water may be held in private ownership, subject to the public rights of navigation

[80] See, Oskaloosa Water Co. v. Board of Equalization, 51 N. W. Rep. 18; Hutchins v. Masterson, 46 Tex. 534.

[81] See, Pipe Line Co. v. Berry, 52 N. J. L. 308; Gas Co. v. Thurber, 2 R. I. 15; Water Co. v. Lynn, 147 Mass. 31; People v. Cassity, 46 N. Y. 46.

[82] Goodwin v. Thompson, 15 Lea (Tenn.), 209; Lincoln v. Davis, 53 Mich. 375.

and fishery;[83] and in many instances the state has voluntarily surrendered to the riparian proprietor all its rights not inconsistent with public navigation.

Where the rule last stated is permitted to obtain, the rights of the riparian owner, in the case of rivers, are regarded as extending to the center or thread of the stream,[84] *ad filum aqua;* and the same rule would doubtless apply in the case of lakes and ponds of circumscribed area and regular shore lines.[85]

But while the rule is unquestioned that grants which bound upon a river or stream extend to the center line, provided there be no limitation in the terms of the grant itself, it is equally well settled that the principle does not apply to grants bounding on the great inland lakes or other large bodies of standing fresh water. In this respect a new rule of law has been enunciated, differing radically from that laid down by the common law. In England, where the common law had its origin, there were no great inland seas, and consequently no precedent can be found in the jurisprudence of that country which determines the applicability of the common-law doctrine of riparian rights to questions of this character. A slight analogy will be found in the resemblance of the great lakes to the seas which surround the island of Great Britain; and it has been said that this would seem to call for the application of the same principles as to boundaries which were applied to lands bordering on those seas, with this difference:

[83] Hogg v. Beeman, 41 Ohio St. 81. This case referred to one of the navigable bays of Lake Erie, where the soil was claimed under a grant made or sanctioned by the general government.

[84] Rice v. Monroe, 36 Me. 309; Luce v. Carnley, 24 Wend. (N. Y.) 451; State v. Canterbury, 28 N. H. 195; Cox v. Freedley, 33 Pa. St. 124.

[85] In Rice v. Rudiman, 10 Mich. 139, in speaking of Lake Muskegon, the court, after stating that the real question is not whether the outward limits of private ownership in the lake can be defined with precision, says: "But if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the center line of the narrow lake, then I have no hesitation in saying that I think the riparian ownership extends to such center line. If the water becomes so deep as to render the lands under it incapable of such individual use, the question of ownership beyond where it is available for such purpose becomes as barren as the use itself, and is of no practical importance whatever."

as there is no periodical ebb and flow of tide in the waters of the lakes, the limit should be a low-water instead of high-water mark.[86]

Where the rule prevails that the title of a riparian owner on a navigable stream is bounded by ordinary high-water mark, while he still has certain rights in the land between high and low-water mark, yet these rights are peculiar to himself, and cannot be sold or transferred by him independently of a conveyance of the land to which they are appurtenant.[87] On the other hand, where the right of a riparian proprietor upon navigable waters to improve and reclaim submerged lands to the point of navigability is recognized, it would seem that notwithstanding this right was originally incident to the riparian estate it may yet be separated therefrom and transferred to another.[88]

§ 16. **Water.** It has been said to be vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country,[89] and that property in water, and in the use and enjoyment of it, is as sacred as in the soil over which it flows.[90] But water, from its peculiar nature, is not susceptible of the same use or possession as land, and property therein is at best a mere usufructuary right; and in every case, where of sufficient volume and depth, such right is subservient to the public right of navigation. If the water is not navigable it is, for all practical purposes, the property of the owner of the subjacent soil; and in any event he is entitled to every beneficial use of the same which can be exercised with a due regard for the rights of the public.[91]

In the case of running water the riparian proprietor has a right to the use and enjoyment of it and the benefits to be

[86] Lincoln v. Davis, 53 Mich. 375. The subject will receive further consideration in treating of the construction of grants.

[87] Steele v. Sanchez, 72 Iowa, 65; Musser v. Hershey, 42 Iowa, 356; Phillips v. Rhodes, 7 Met. 322.

[88] Hanford v. Ry. Co., 44 N. W. Rep. (Minn.) 1144; Gilbert v. Emerson, 55 Minn. 254, and see, Barker v. Bates, 13 Pick. (Mass.) 255; Pike v. Munroe, 36 Me. 309.

[89] Gavitt v. Chambers, 3 Ohio, 497.

[90] Lorman v. Benson, 8 Mich. 32; Wadsworth v. Tillotson, 15 Conn. 366.

[91] Cary v. Daniels, 5 Met. (Mass.) 236.

derived from it as it flows through his own land; but, as this right is common to all through whose land it flows, it follows that no one can wholly destroy or divert it so as to prevent it from passing to the property below, or wholly obstruct it so as to throw it back upon the land of the one above.[92]

In the case of standing water, as well as water percolating through the soil, while absolute ownership, in the strict sense of the term, is of course impracticable, yet the right of property, so far as the element is capable of beneficial use, is complete in the owner of the freehold, free from any usufructuary rights in others.[93]

But while property in water can be regarded in no higher light than a mere usufructuary right, such right is, nevertheless, a proper and valid subject of sale and conveyance, and may be disposed of quite independently of the soil upon which the water rests or over which it flows.[94] This is one of the oldest and best-recognized principles of the law relating to waters, finding frequent reference in the ancient books in connection with grants of a "pool," a "gulph," as well as of a "stream" and "part of a river."[95] A grant of a stream or any part thereof, or of any waters by fixed boundaries, can only be made by a deed duly executed;[96] yet such grant may be presumed, as in other cases, from adverse occupation and user for twenty years.[97]

By the civil law in a grant of any easement or service, under which was classed the use of streams of water, a right to the soil passed, so far as was necessary to the enjoyment of the

[92] The right to the use of flowing water is not an easement; it is inseparably connected with and inherent in the land and passes with it. The right to have it flow over the land of another is more in the nature of an easement, although not strictly such in fact; and where a proprietor of a large tract through which a water-course passes sells parcels above and below the part he retains, each grantee would take his parcel with full rights and subject to corresponding duties, without special or express words. Cary v. Daniels, 8 Met. (Mass.) 466; Hill v. Newman, 5 Cal. 445; Van Sickle v. Haines, 7 Nev. 249; Wadsworth v. Tillotson, 15 Conn. 366.

[93] Hanson v. McCue, 42 Cal. 303; Wilson v. New Bedford, 108 Mass. 261.

[94] Avon Mfg. Co. v. Andrews, 30 Conn. 476; Bobo v. Wolf, 18 Ohio St. 463; Hines v. Robinson, 57 Me. 324.

[95] Co. Lit. 5 a, b; Plowd. Com. 154; Bac. Ab. Grant. H.; 2 Blk. Com. 19.

[96] Bullen v. Runnels, 2 N. H. 255.

[97] Bucklin v. Truell, 54 N. H.

service;[98] and the same rule, substantially, seems to have been adopted by the common law,[99] although no interest in the soil for any other purpose would pass; but ordinarily a grant of water will not pass the soil beneath, probably because the soil, not being named and not being incident to water, cannot be considered as embraced by that word.[1]

By the laws of some of the western states, ditches for mining and irrigation purposes are declared real property, and the laws of these states relative to the sale and transfer of land are made applicable thereto.[2]

§ 17. **Ice.** While ice is only water in a congealed state, it nevertheless partakes largely of the general characteristics of land, and is capable of an ownership not unlike that by which land is held. It has been held to be connected with, and in the nature of, an accession to the land, being an increment arising from formations over it, and belonging to the land properly, as being included in it, in its indefinite extent upwards;[3] and such, no doubt, must be the character accorded to it so long as it remains in place upon the soil.[4] In this condition it would certainly pass as a portion of the realty upon a sale of the land to which it is attached.

The general rules which govern riparian proprietors in the use and enjoyment of water apply with practically the same force and effect in respect to ice. That is, if the policy of the state permits ownership beyond the bank of a navigable water way the ice which forms upon the stream contiguous to his land will be the property of the adjacent land owner;[5] if, on the other hand, the local public policy restricts ownership to the shore instead of the thread of the stream, then the ice

122; White v. Chapin, 12 Allen (Mass.), 516; Steffy v. Carpenter, 37 Vt. 41.

[98] Domat, b. 1, tit. 1, sec. 1; Bracton, b. 4.

[99] 1 Burr. 143; 22 Edw. IV. pl. 8, p. 24.

[1] 2 Bl. Com. 19.

[2] Whether this includes the registration of deeds or conveyances of such ditches may be a question; but, as the effect or operation thereof depends to some extent on registration, probably it does. Gest v. Packwood (U. S. C. Ct. Oreg. 1888).

[3] Washington Ice Co. v. Shortall, 101 Ill. 46; State v. Pottmeyer, 33 Ind. 402.

[4] Hydraulic Co. v. Butler, 91 Ind. 134; Woolen Mill Co. v. Smith, 34 Conn. 462; Lorman v. Benson, 8 Mich. 18; Brown v. Brown, 30 N. Y. 519; Brooklyn v. Smith, 104 Ill. 429; Pine v. Woods, 108 Mass. 160.

[5] Washington Ice Co. v. Shortall,

which forms thereon would undoubtedly be public property which might be made the subject of private ownership by simple appropriation.[6]

Ice has not been much dealt with as property, however, until very modern times, and for this reason no settled body of legal rules has been agreed upon concerning it. In the determination of questions which have arisen in regard to it, recourse has usually been had to common-law principles; yet these principles, in the main, are not strictly applicable. So far as the principles of the common law go, they have usually if not universally treated nothing movable as realty unless either permanently or organically connected with the land; while the tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses as far as possible. In its essentials, ice is only the product of water which has become fixed by freezing; in this condition it draws nothing from the land, and if removed will lose its identity by melting. It has no organic connection with the land, and if severed can only be joined to it again by the alternate process of melting and freezing. It is, in many cases, liable to disruption and consequent loss to the freeholder by being swept away, while its ephemeral character renders it incapable of any permanent beneficial use as part of the soil, and it attains its greatest value only when removed from its original position. Regarding it, therefore, in this light, and with reference to its uses in fact as a commercial commodity, while it may for many purposes justly be regarded as part of the realty when resting in place, yet a sale of ice already formed, as a distinct and specific article, may properly be regarded as a sale of personalty, whether in or out of the water.[7]

§ 18. **Oils and gases.** Earth oils and volatile gases occupy

101 Ill. 46; Brooklyn v. Smith, 104 Ill. 429; State v. Pottemyer, 33 Ind. 432.

[6] Wood v. Fowler, 36 Kan. 682; Woodman v. Pittman, 76 Me. 456.

[7] Higgins v. Kusterer, 41 Mich. 318; and see Washington Ice Co. v. Shortall, 101 Ill. 46. The writer has been unable to find any direct authority upon the question of the validity of contracts for future uses or interests in ice not yet formed; and whether such dealings are to be regarded as leases or licenses, or executory sales, may still be considered as an open question.

much the same position in the law of real property as water. They are usually classed as minerals, possessing, in some degree, a kindred nature. They are fully included in the comprehensive term "land," and are a part of the soil in which they are found so long as they remain in place.[8] Being thus regarded as land it follows that they may be made the subject of special agreements and sold separate from the soil in which they are confined. They possess, however, substantially the same general attributes as water, and therefore cannot be, in any just sense of the term, the subject of a grant as of a corporeal interest. In this respect they differ materially from coal, ores, etc. At best, the grant of oils or gases, or of the right to sink shafts and extract same, is a license, and is governed by the rules which apply to licenses.[9] Unlike other minerals they have the power as well as the tendency to escape without the volition of the owner and when this occurs the title is lost.[10]

§ 19. **Church pews.** Inclosed seats in churches do not appear to have been known, according to the modern use and idea, until long after the Reformation, and were not in general use until about the middle of the seventeenth century. Prior to that time no separate seats were allowed except in a few instances, and the body of the church was common to all. They constitute a subject of very peculiar ownership, and have given rise to some very remarkable decisions. According to the English idea the interest of a pew-holder is of an incorporeal nature only—an easement, as it were—and consists mainly of the right to enter and occupy during the celebration of divine service. In this country, in the absence of a statute declaring their status, they are generally considered as partaking of the nature of realty;[11] and the owner has been held to have an exclusive right of possession

[8] Gerkins v. Salt Co., 100 Ky. 734; Peoples' Gas Co. v. Tyner, 131 Ind. 277; Williamson v. Jones, 43 W. Va. 562.

[9] Dark v. Johnston, 55 Pa. St. 164.

[10] Westmoreland Gas Co. v. De Witt, 130 Pa. St. 235.

[11] O'Hear v. De Goesbriand, 33 Vt. 593; Barnard v. Whipple, 29 Vt. 401; Sohier v. Trinity Church, 109 Mass. 1; Brumfield v. Carson, 33 Ind. 94; Presbyterian Church v. Andruss, 21 N. J. L. 325; and see Church v. Wells, 24 Pa. St. 249; Price v. Lyon, 14 Conn. 279; Third Presby. Church v. Andrus, 21 N. J. L. 325.

and enjoyment, for the purposes of public worship, not as an easement, but by virtue of an individual right of property.[12] This right, however, even though it be regarded as an interest in realty, does not extend to the fee,[13] and for all practical purposes is usufructuary only.[14] Though it be not an easement in name, it is such in reality;[15] for as between the pew-owner and the church corporation, his right is simply one of occupancy, in the mode prescribed by the rules of the church or agreed upon at the time of the purchase.[16] It has been held that the right to a pew can only be transferred in the manner provided for the transfer of real property;[17] and where the rights conferred are absolute and the entire property vested in the pew-owner, such would undoubtedly be the rule; yet, as a matter of fact, the old system of pew conveyances has almost become obsolete. Deeds are no longer given in the majority of churches, and the sittings are let by what amounts to nothing more than a mere license, differing in no essential particular from that employed in the sale of seats in places of public amusement.

It would seem also, that even when pews are regarded as realty, and as such subject to the incidents of realty, yet the rights of the pew holder are very limited in their scope and do not extend to confer a legal interest in the church edifice or the materials of which it is composed, nor to the land on which it stands.[18] Such interest is further limited in point of time, and if the building is burned or falls into decay which renders it useless the right of the pew holder is lost.[19]

§ 20. **Burial lots.** As a rule the purchaser of a cemetery

[12] O'Hear v. De Goesbriand, 33 Vt. 593; Church v. Andruss, 21 N. J. L. 325.

[13] Gay v. Baker, 17 Mass. 435; Baptist Society v. Grant, 59 Me. 245; Kincaid's Appeal, 66 Pa. St. 411.

[14] Craig v. Presbyterian Church, 88 Pa. St. 42; Gay v. Baker, 17 Mass. 435.

[15] Union House v. Rowell, 66 Me. 400; Van Houten v. Ref. Dutch Church, 17 N. J. Eq. 126.

[16] Baptist Society v. Grant, 59 Me. 245; Sohier v. Trinity Church, 109 Mass. 1.

[17] Barnard v. Whipple, 29 Vt. 401; and see Vielie v. Osgood, 8 Barb. (N. Y.) 130; Brumfield v. Carson, 33 Ind. 94; Livingston v. Trinity Church, 45 N. J. L. 237; Price v. Lyon, 14 Conn. 279.

[18] Gay v. Baker, 17 Mass. 435; Matter of Reformed Dutch Church, 16 Barb. (N. Y.) 237.

[19] Freligh v. Platt, 5 Cow (N. Y.) 494; Voorhees v. Presby. Church, 17 Barb. (N. Y.) 108.

lot takes no title to the soil. The grant is in the nature of a license or privilege to make interments in the plot described, exclusive of others, so long as the ground shall remain in such use.[20] Such right is, however, real property. It may be sold and transferred to others, if nothing in the grant prevents, and is to be treated generally as an incorporeal hereditament.

§ 21. **Appurtenances.** Land is ordinarily conveyed together with the hereditaments and appurtenances thereunto belonging. An appurtenance is described in general terms as something belonging to another thing as principal, and which passes as an incident to such principal thing.[21] Thus, in a grant of lands, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto. But land is never appurtenant to land.[22] nor will the term carry with it any rights or interests in the property of the grantor on other lands which he owns,[23] neither can it be made to include anything not situate on the land described in the deed, even though it belongs to the grantor and is used by him in his business.[24] It is designed only to pass rights and privileges of an incorporeal character, and of these only such as are directly necessary to the proper enjoyment of the granted estate.

§ 22. **Easements.** An easement is generally defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner;[25] and it may still further be defined as an incorporeal right existing in favor of, and imposed upon, corporeal property. The converse of an easement is denominated a serviture. The land to which the privilege is attached is called the dominant estate, and that against which it exists the servient estate;

[20] Kincaid's Appeal, 66 Pa. St. 411; Rayner v. Nugent, 60 Md. 515.

[21] Bouv. Law Dict. 136.

[22] Grant v. Chase, 17 Mass. 443; Leonard v. White, 7 Mass. 6; Barrett v. Bell, 82 Mo. 110.

[23] Frey v. Drahos, 6 Neb. 1; Ogden v. Jennings, 60 N. Y. 526.

[24] Frey v. Drahos, 6 Neb. 1.

[25] 2 Wash. Real Prop. 25. In the old books it is defined as a privilege which the owner of one adjacent tenement hath of another, existing in respect to their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in re-

and as these rights are not usually personal, and do not change with the persons who may own the respective estates, it is very common to personify the estates as themselves owning or enjoying the easements.

An easement is technically created only by a grant or confirmation; but such grant may be implied when the existence of the easement is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that where one grants anything to another he thereby grants to him the means of enjoying it, whether expressed or not;[26] and in pursuance of this principle the general rule is that, in every deed of a part of the grantor's land without express provision on the subject, there is an implied grant or reservation of all easements of necessity for the enjoyment of the part conveyed or the part retained.[27] Generally, however, the rule which creates an easement, without an express reservation, upon the severance of two tenements or heritages by the sale of one of them, is confined to cases where some apparent sign of servitude on the part of one in favor of the other then exists which would indicate itself to one reasonably familiar with the subject, upon an inspection of the premises.[28]

An easement may also be established by prescriptive user from which a grant is inferred; but, in respect to the acquisition of easements in this manner, no universal rule of law as to the effect in evidence of particular facts can be laid down. Whether long-continued use of an easement is adverse or is in subordination to the title of the true owner is a matter of fact, to be decided, like other facts, upon the evidence and upon the circumstances of each particular case.[29] Where an easement is established by prescription or inferred from user it is limited to the actual user.[30]

Easements are classed as appurtenant or in gross; but so far as their capacity for independent alienation is concerned the classification is immaterial. Whether an easement is

gard to his own land for the advantage of him in whose land the privilege exists. Termes de la ley, Easements; Bouv. Law Dict.

[26] Lanier v. Booth, 50 Miss. 410.

[27] Dillman v. Hoffman, 38 Wis. 559.

[28] Butterworth v. Crawford, 46 N. Y. 349; Providence Tool Co. v. Corliss Co. 9 R. I. 564.

[29] Bradley's Fish Co. v. Dudley, 37 Conn. 136.

[30] Brooks v. Curtis, 4 Lans. (N. Y.) 283.

appurtenant or appendant to an estate in fee in lands, or in gross, to the person of the grantee for life or for years, it is equally incapable of alienation or conveyance in fee. When in gross it is purely personal to the holder and cannot be assigned, nor will it pass by descent; when appurtenant it is attached to, or incident to, the land and passes with it, whether the land be conveyed for a term of years, for life or in fee. Being an incident to the land, it cannot be separated from or transferred independent of the land to which it inheres.[31]

§ 23. **License.** In the common law the word "license" is of early, constant and well-defined use, as applied to the concession of certain rights by the owners of land to a third party. In this relation it imparts to the licensee rights resembling, though not identical with, an easement. It is generally defined as an authority to do some one act or series of acts on the land of another without passing any estate in the land;[32] and the right or property thus conferred is of that class denominated incorporeal hereditaments. A license may be created by parol; but if it constitutes a permanent right or confers any interest in the land must be by grant,[33] and when such license is coupled with an interest by reason of the payment of price or other act, it has been held that the authority conferred is not a mere permission, but amounts to a grant which obliges the grantor and vests legal property in the grantee.[34]

Licenses which, in their nature, amount to the granting of an estate, though for ever so short a time, are considered as leases.[35]

A license, being a mere privilege founded in personal confidence, ceases with the death of either party, or with a sale

[31] Wash. Easements, 10; Kœlle v. Knecht, 99 Ill. 496. "They are in the nature of covenants running with the land," says the court in Garrison v. Rudd, 19 Ill. 558, "and, like them, must respect the thing granted or demised, and must concern the land or estate conveyed. They pass by a conveyance of the land, under the term 'appurtenances,' without being expressly named."

[32] Cook v. Stearns, 11 Mass. 536; Mumford v. Whitney, 15 Wend. (N. Y.) 390.

[33] Chute v. Carr, 20 Wis. 531; Cook v. Stearns, 11 Mass. 536.

[34] Rerick v. Kern, 14 S. & R. (Pa.) 267; Metcalf v. Hart, 3 Wyo. 513.

[35] Cook v. Stearns, 11 Mass. 536.

or conveyance of the land,[36] and cannot be transferred or alienated by the licensee,[37] and, if executory, is revocable at any time at the pleasure of the grantor.[38]

When executed, in whole or in part, the question of revocation is one of great difficulty to properly determine and respecting which courts of the highest standing have arrived at widely differing conclusions. The better doctrine would seem to be that when the licensee has made valuable improvements or expended money in consequence of the extension of the privilege it then becomes irrevocable so far as such revocation may injuriously affect him,[39] and usually courts of equity will not permit the revocation of a license when it has been given to influence the conduct of another and has caused him to make large investments.[40]

A license operates as a protection for any act done under it while in force, but after revocation the licensee will become a trespasser and as such may be evicted by the land owner. A sale and conveyance of the land will itself amount to a revocation of a previous license and the purchaser may immediately bring his action to recover possession.[41]

The main difference between an easement and a license lies in the fact that the former must arise in grant, while the latter, conveying no estate or interest in the land, may rest in parol; yet the distinction is very subtle, and it becomes difficult in many cases to discern a substantial difference between them.[42]

§ 24. **Franchises.** A franchise, in its original form, was a royal privilege or prerogative of the king, subsisting in the subject by a grant from the crown; and, except that the grant comes from the people in their sovereign capacity, the general

[36] Hodgkins v. Farrington, 150 Mass. 19; Kremer v. Ry. Co. 51 Minn. 15.

[37] Johnson v. Babcock, 4 Johns. (N. Y.) 418; Prince v. Case, 10 Conn. 375; Dark v. Johnston, 55 Pa. St. 164; but see, Keystone Lumber Co. v. Kolman, 94 Wis. 465.

[38] De Haro v. United States, 5 Wall. (U. S.) 599; Mumford v. Whitney, 15 Wend. (N. Y.) 380.

[39] Flickinger v. Shaw, 87 Cal. 126; Baldock v. Atwood, 21 Or. 73.

[40] Curtis v. Water Co., 20 Org. 34; Thomas v. Irrigation Co., 80 Tex. 550.

[41] Kremer v. Ry. Co., 51 Minn. 15; Eggleston v. R. R. Co., 35 Barb. (N. Y.) 162; and see, Galway v. Ry. Co., 128 N. Y. 132; Lamm v. Ry. Co., 45 Minn. 73.

[42] Mumford v. Whitney, 15 Wend. (N. Y.) 380; Thompson v. Gregory, 4 Johns. (N. Y.) 81.

features have not been changed in this country. In the law of real property the term is ordinarily applied to grants for the maintenance of bridges, ways and ferries.[43]

The grant of a franchise creates a vested property right, and, unless expressly restricted to the person of the grantee as an individual privilege, is alienable in the same manner as other forms of real property.[44]

§ 25. **Property in adverse seizin of a third person.** "From an early date," observes Mr. Washburn,[45] "the policy of the law has not admitted of the conveyance by any one of a title to land which is in the adverse seizin and possession of another;" and this has always been one of the fundamental principles of the common law.[46] As such it has been recognized and enforced in all of the older states of the Union, and deeds made under those circumstances have in many instances been declared void.[47] Such deeds were considered as passing no title, but simply as the transfer of a mere right of action; and, being in violation of the early laws against champerty and maintenance, the courts refused to sustain them.[48] This doctrine prevailed for many years, and still obtains, though in a less obnoxious form, in a few of the states;[49] but even in states where such conveyances are discouraged, they have

[43] Under the English law the title included a large number of subjects wholly unknown in America, as forest, chase, free-warren, fishery, etc.

[44] Dufour v. Stacey, 90 Ky. 288; Lippencott v. Allander, 27 Iowa, 460.

[45] 3 Wash. Real. Prop. (4th ed.) 329.

[46] Co. Lit. 214; 4 Kent's Com. 446.

[47] Jackson v. Demont, 9 Johns. (N. Y.) 55; Thurman v. Cameron, 24 Wend. (N. Y.) 87; Early v. Garland, 13 Gratt. (Va.) 1; Michael v. Nutting, 1 Ind. 291; Dexter v. Nelson, 6 Ala. 68; Ring v. Gray, 6 B. Mon. (Ky.) 368; Way v. Arnold, 18 Ga. 181; Brinley v. Whiting, 5 Pick. (Mass.) 348; Betsey v. Terrence, 34 Miss. 132; Heirs v. Kidd, 3 Ohio, 541; Dame v. Wingate, 12 N. H. 291.

[48] The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The repeated statutes which were passed in the reigns of Edw. I. and Edw. III. against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times from the dangerous influence and oppression of men in power. See 4 Kent's Com. 477.

[49] See Sohier v. Coffin, 101 Mass. 179; Jones v. Monroe, 32 Ga. 188.

been held to be good against the grantor and all other persons except the adverse possessor.[50] The doctrine, however, does not find favor in the United States,[51] and is fast becoming obsolete. It has lost much of its force where still administered; and in most of the states, while the earlier decisions may seem to have adopted it as part of the common law of the state, it has been swept away by express statutory enactment. Under these statutes any one claiming title to land, although out of possession, and notwithstanding there may be an actual adverse possession may sell and convey the same as though in the actual possession, and his deed will give the grantee the same right of recovery in ejectment as if the grantor had been in the actual possession when he conveyed.[52]

Where the doctrine is still recognized a deed of land of which the grantor is disseized is not wholly void. It is good as between the parties, and it gives to the grantee the right to recover possession to his own use in the name of the grantor. So, too, while it may be that no title passes which will support a real action in the name of the grantee, or give him a right of entry against the disseizor or those claiming under him,[53] yet it is settled that, if the grantee obtains possession of the land, he can unite that possession to his title acquired by such deed, and so, by way of estoppel and to prevent a circuity of action, defeat a real action brought by the disseizor to recover the same. The disseizin is terminated by the entry and occupation of one who claims title by deed from the true owner, and not adversely, and the latter as well as all those from whom by successive deeds the title is derived are estopped by their several deeds to deny that title. So, although the deed gives to the grantee no right of entry, because such right is not assignable at common law, yet if he enters and obtains possession, even

[50] University v. Joselyn, 21 Vt. 52; Abernathy v. Boazman, 24 Ala. 189; Hamilton v. Wright, 37 N. Y. 502.

[51] Roberts v. Cooper, 20 How. (U. S.) 467; Cresenger v. Welch, 15 Ohio, 156; Drennan v. Walker, 21 Ark. 539; Stewart v. McSweeney, 14 Wis. 468; Carder v. McDermott, 12 Tex. 546.

[52] Chicago v. Vulcan Iron Works, 93 Ill. 222; Crane v. Reeder, 21 Mich. 82; Stewart v. McSweeney, 14 Wis. 468; Roberts v. Cooper, 20 How. (U. S.) 467.

[53] Land v. Darling, 7 Allen (Mass.), 205.

against the wishes of the party in possession, the title is thereby made good against the latter, and cannot be disputed in an action which puts the title directly in issue. In an action of trespass the grantee may not be able to justify such entry, but it does not follow for that reason that he has no defense to a real action. He does not by his tortious entry forfeit his right to recover possession in the name of the grantor, and because he has this right the demandant is not allowed to set up his claim in a real action against him.[54]

[54] See Wade v. Lindsey, 6 Met. 111 Mass. 148; Rawson v. Putnam, (Mass.) 407; Farnum v. Peterson, 128 Mass. 552.

Art. II. The Estate.

§ 26. Definition.
27. Estates at common law.
28. Estates under the statute.
29. Fee-simple.
30. Fee-tail.
31. Estates for life.
32. Dower.
33. Curtesy.
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35. Estates for years.
§ 36. Estates at will and by sufferance.
37. Joint estates.
38. Estates by entirety.
39. Contingent interests and estates.
40. Expectancies and naked possibilities.
41. Powers.

§ 26. **Definition.** An estate[1] has been defined as the degree, quantity, nature and extent of interest which a person has in real property;[2] and in every sale of land direct reference is had to the estate to be conveyed, whether the same receives specific mention or not; and this estate, unless limited by express words, is usually held to be all that the vendor possesses. He cannot convey a greater estate, no matter what language may be used; but should he assume so to do, and to warrant the interest thus purported to be sold, he will be estopped to deny that he did not so possess the same if at any subsequent period he should perchance acquire it.

§ 27. **Estates at common law.** The main ingredients of estates are classified as quantity and quality. Quantity has reference to the duration and extent of estates, and occasions their primary division into such as are freehold[3] and such as are less than freehold. The former has been described as an

[1] In Latin, *status*, because it signifies the condition or circumstance in which the owner stands with regard to his property.

[2] 1 Bouv. Law Dict. 539. The term is also used in a general and extensive sense as applied to lands and houses—as, "my estate at Blank," etc.; and in the case of decedents this sense has acquired a legal signification, including personal as well as real property. The one given in the text, however, is its true technical meaning.

[3] This was called, in the ancient books, *liberum tenementum*, frank tenement, or freehold, and was formerly described to be such an estate as could only be created by livery of seizin, a ceremony similar to the investure of the feudal law. Since the introduction of modern conveyancing this definition has, of course, no application.

interest in lands or other real property, held by a free tenure,[4] for the life of the tenant or that of some other person, or for some uncertain period. The test seems to lie in its indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, or may be determined by the volition of another, it is not, under the common-law rules, an estate of freehold.[5] Quality refers to the tenure by which the estate is held, and to the manner of its enjoyment, as absolutely, jointly, in common, etc. Freeholds are themselves divided into estates of inheritance and estates not of inheritance; the former comprising estates of unqualified ownership and potentially infinite duration, the latter estates for life, or those of indefinite duration which may endure for a life.

Allodial titles being unknown to the common law, the largest estate which a subject could possess in land was termed a fee, or, as usually written, a *fee-simple*. This term was derived from the feudal system, and originally signified the tenure by which the land was held. In itself it denoted a full power of disposition during the life-time of the tenant and of descent to his heirs upon his death. But the British land system was always highly complex and very artificial, and the fee, in many cases, was hedged about with a large number of what to us now seems a bewildering maze of limitations, conditions and restrictions, amid the subtilties of which even the astute common-law conveyancer often floundered in helpless confusion. The fee was divided into fee-simple absolute, fee-simple conditional and fee-simple

[4] Upon the introduction of the feudal law, all the lands in England became holden either by a free or a base tenure. The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least, and could not be dispossessed, even for the non-payment of his rent or the non-performance of his services; whereas the tenant who held in villenage might be turned out at the pleasure of his lord; the person holding by a free tenure, therefore, was called a freeholder, because he might maintain his position against his lord. See Cruise Dig. tit. I, s. 16.

[5] Thus, if lands are conveyed to a man and his heirs forever, or for the term of his natural life, or until he is married, he has an estate of freehold; but if lands are limited to a man for five hundred years, or for ninety-nine years, if he shall so long live, he has not an estate of freehold. 2 Bl. Com. 386.

qualified, or base fee, or, as sometimes called, a determinable fee.[6] Growing out of these estates was a vast number of reversions, remainders, etc., in many cases very complex, and all bearing evidence of the highest degree of legal ingenuity in their several inventors. Notably among the devices contrived to perpetuate power and wealth in the hands of certain families was the system of estates-tail, which almost wholly restrained the power of alienation, and the land continued to pass to successive heirs, in the order named by the donor, until default of issue caused a reverter. Estates were limited upon estates, apparently without end, and remainders were created upon remainders for the benefit of generations far in the future.

The greatest nicety was observed in the creation of all common-law estates, of whatever kind and nature, and great stress was laid upon the employment of the language by which they were raised.

§ 28. **Estates under the statute.** In most of the states the nature and quality of estates in land have been formally defined and fixed by statute, and while in a majority of instances the common-law nomenclature has been retained, the common-law incidents have generally been greatly modified or abolished. Estates of inheritance and for life are usually classed as freeholds; while estates for years, without regard to the period of duration, are denominated chattels real, and subjected to chattel incidents.[7] Estates at will or by sufferance are generally regarded as mere chattel interests. With respect to the time of their enjoyment, estates are said to be in possession or expectancy—the former being where the owner has an immediate right to possess and enjoy the land, the latter where the right to possession is postponed to a future period. Estates in expectancy are themselves divided into future estates and reversions. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate or on the determination, by lapse of time or otherwise, of a

[6] The principle is still retained under what is termed a conditional limitation.

[7] See 2 Bl. Com. 386; Brewster v. Hill, 1 N. H. 350; Spangler v. Stanler, 1 Md. Ch. 36; Chapman v. Gray, 15 Mass. 439.

precedent estate created at the same time. When a future estate is dependent upon a precedent estate it is called a remainder, and may ordinarily be created and transferred by that name. Reversions remain as at common law, and are the residue of estates left in the grantor or his heirs, commencing in possession on the determination of particular estates granted.[8]

Entailed estates, with all their incidents, have been generally abolished, and as a rule every future estate is void in its creation which suspends the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate,[9] except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any contingency by which the estate of such persons may be determined before they attain their full age.[10] The limitation of successive estates for life is no longer permitted unless to persons in being at the creation thereof; and ordinarily, when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder takes effect in the same manner as if no other life estate had been created. Usually no remainder can be created upon an estate for the life of any other person than the grantee of such estate, unless such remainder be in fee; nor can any remainder be created upon such an estate in a term for years, unless it be for the whole residue of the term.

§ 29. **Fee-simple.** Freehold estates of inheritance are usually denominated estates in fee—a name borrowed from the ancient land system of England, but of far greater import here than there. It signifies an absolute estate of inheritance, clear of any restrictions to particular heirs, and is the largest estate and most general interest that can be enjoyed in land,

[8] The definitions of the text apply generally to all of the states which have followed the lead of New York.

[9] Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

[10] An exception is also made when land has been granted to literary or charitable corporations for their sole use and benefit.

being the entire property therein, and confers an unlimited power of alienation.[11] The estate is wholly comprised in the word "fee," although it is customary to describe it as a "fee-simple," and in some instances as "fee-simple absolute." It has been said that the term "simple" has been added for the purpose of showing that the estate is descendible to the heirs generally, without restraint to the heirs of the body, etc.;[12] and possibly if the American estate were identical with its English prototype this explanation would have significance; but as a matter of fact as well as law the addition of the word "simple" adds nothing to the force or comprehensiveness of the term.[13]

The creation of the estate was formerly very technical, and was raised only by a grant to a man and his heirs; hence, as Littleton[14] quaintly observes, "if a man would purchase lands or tenements in fee-simple, it behooveth him to have these words in his purchase; to have and to hold to him and his heirs; for these words (his heirs) make the estate of inheritance." For many years the rule as stated by Littleton prevailed in the United States; but more recently the statute has abrogated the common-law rule, and every estate in lands which may be granted, conveyed or devised is deemed a fee-simple or estate of inheritance, if a less estate is not limited by express words or created by construction or operation of law.[15]

§ 30. **Fee-tail.** Donations of land were originally simple and pure, without any condition or modification annexed to them; and the estates created by such donations were held in fee-simple. In course of time, however, it became customary to make donations of a more limited nature, by which the gift was restrained to some particular heirs of the donee, exclusive of others; as, to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collateral heirs and lineal female heirs.[16] These

[11] Haynes v. Bourn, 42 Vt. 686.

[12] 1 Prest. Est. 420.

[13] Jecks v. Toussing, 45 Mo. 167.

[14] Lit. § 1, ch. 1, b. 1.

[15] Leiter v. Sheppard, 85 Ill. 242; Fash v. Blake, 38 Ill. 363. Where a deed purports to convey all the interest and title of the grantor it will be given effect accordingly. Thomas v. Chicago, 55 Ill. 403.

[16] These limited donations seem to have come into use in England

estates were known as estates in fee-tail, being estates of inheritance, but descendible only to some particular heirs of the persons to whom they were granted, and not to their heirs-general.[17] The object was to preserve great landed properties intact to particular families by restricting the power of alienation; and the estate continued so long as there was posterity in the regular order of descent, but determined as soon as it reached an owner who died without issue.

One of the marked characteristics of American law is its abhorrence of perpetuities and of all devices calculated to place restraints upon free alienation. This early became manifest in respect to estates-tail; and while the estate cannot be said to be altogether abolished, it has been so modified that where land is given to one and the heirs of his body begotten the entail extends only for one degree. Thus, the

about the end of the reign of Henry II., and were probably introduced for the purpose of restraining the power of alienation, which at that time had become general in the case of fee-simple estates. But the propensity which then prevailed to favor a liberty of alienation induced the courts of justice to construe limitations of this kind in a very liberal manner; and, instead of declaring that these estates were descendible to those heirs only who were particularly described in the grant, according to the manifest intention of the donors and the strict principles of the feudal law, and that the donees should not in any case be enabled by their alienation to defeat the succession of those who were mentioned in the gift, or the donor's right of reverter, they had recourse to an ingenious device taken from the nature of a condition. The estate was regarded as a conditional fee; that is, it was held to be granted to a man and the heirs of his body on condition that he had such heirs; and as soon as issue was born the estate became absolute by the performance of the condition, while the right of alienation might be freely exercised. From this mode of construing conditional fees the purposes for which they were intended were completely frustrated; and, therefore, the nobility, in order to perpetuate their possessions in their own families, procured the statute of Westm. 2, 13 Edw. I., commonly known as the statute *De Donis*, which provided that the will of the giver, according to the form in the deed manifestly expressed, should be observed, "so that they to whom a tenement was so given under condition should not have power to alien the same tenement, whereby it should remain after the death of the donees to their issue, or to the donor or his heir if issue failed." See Cruise, Dig. tit. II.

[17] It is called an estate-tail, or a fee-tail, from its similarity to the *feodum talliatum*, which appears to have been well known at that time.

donee would take a life estate, while the second taker would have the remainder in fee.

§ 31. **Estates for life.** An estate for life is a freehold interest in lands, both at common law and under the statute, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.[18] It confers upon the tenant the possession and enjoyment of the land during the continuance of his estate, while the absolute property and inheritance of the land itself is vested in some other person. Such estates are created in two ways: either expressly, as by deed or other legal assurance, or by the operation of some principle of law;[19] but the incidents are much the same in either case. Whenever lands are conveyed to a man for the term of his own life he is called tenant for life; but where he holds for the life of another he is, in technical parlance, tenant *pour auter vie*; and in like manner where a person having an estate for his own life, either by express limitation or by the operation of some principle of law, grants it over, the grantee becomes the tenant *pour auter vie.*

Estates for life will generally endure as long as the life or lives for which they are granted; but there are estates for life which may determine upon future contingencies before the death of the person to whom they are granted. Thus, if an estate be given to a woman so long as she remains single, or during her coverture, or as long as the grantee shall dwell in a particular place, etc.,—in all these cases the grantees would have estates for life, determinable on the happening of uncertain events.

Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits during the continuance of the estate. He also has the power of alienating his whole estate and interest,[20] or of creating out of it any less estate than his own, unless restrained by positive condition; and while any attempt to create a greater estate than his own must necessarily be void, upon the principle that a man cannot convey that which he does not possess, yet his

[18] Cruise, Dig. tit. 3.

[19] Stewart v. Clark, 13 Met. (Mass.) 79.

[20] Roseboom v. Van Vechten, 5 Denio (N. Y.), 414.

deed will nevertheless be operative and effective to pass whatever estate or interest he has.[21]

§ 32. **Dower.** Among the life estates derived from the common law is that which a widow acquires in a certain portion of her husband's lands, after his death, for her support and maintenance. This estate is known as dower, and is said to have been derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but that the husband should allot a part of his property for her use in case she survived him.[22] From an early day this seems to have been a part of the common law of England, receiving frequent mention in the royal charters and concessions, and at Littleton's time had assumed much the same condition that it retains to-day; for, in speaking of it, he says: "Tenant in dower is where a man is seized of certain lands and tenements in fee-simple, fee-tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of a third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold the same to the wife in severalty, by metes and bounds, for term of her life; whether she hath issue by her husband or no, and at what age soever the wife be, so as that she be past the age of nine years at the time of the death of her husband."[23] But the common-law right of dower no longer exists in the United States, the rights of the surviving wife in the real property of her deceased husband being those created by statute alone, and whatever incidents may have attached to the ancient estate have either been swept away or incorporated in the rights derived under the statute. No uniform measure, either as to quantity or

[21] This is directly the reverse of the ancient doctrine, for fealty was the main tenure by which these estates were formerly held; hence they were for many years considered in many respects as strict feuds, and forfeitable for many of the causes for which feuds were formerly forfeited. Hence if a tenant for life attempted to convey a greater estate than he possessed, whereby the estate in remainder or the reversion was divested, such conveyance was held to operate as a forfeiture of the life estate. In the United States this matter is now very generally regulated by statutes which provide that no deed of a tenant for life or years shall work a forfeiture, or shall operate to pass a greater estate than he could lawfully convey.

[22] Cruise, Dig. tit. VI.

[23] Litt. § 36.

quality, has been adopted; but in the main the estate conferred upon the widow conforms to that of the common law, and consists of the use, during her life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.

During the life-time of the husband the wife has only an inchoate right, which is not an estate in the land, but a mere contingent interest that attaches to the land as soon as there is the concurrence of marriage and seizin.[24] This interest becomes fixed and certain upon the death of the husband, and after assignment of dower develops into a freehold estate in the land.[25]

During coverture the wife's inchoate right of dower is incapable of being transferred or released, except to one who has already had, or by the same instrument acquires, an independent interest in the land.[26] The right is not such an estate as can be leased or mortgaged;[27] neither can a married woman bind herself personally by a covenant or contract affecting her right of dower during the marriage. Hence, a deed executed by husband and wife with covenants of warranty does not estop the wife from setting up a subsequently-acquired title to the same lands.[28] During the marriage, no act of the husband alone can bar or extinguish this interest but a woman may be barred of her dower by jointure, settled upon her before marriage, or by joining with her husband in a deed of conveyance, properly acknowledged. The release of dower which a woman makes by joining with her husband in a conveyance of his land operates against her only by estoppel, however, and can be taken advantage of only by those who claim under that conveyance;[29] and if the conveyance is void or ceases to operate, she is again clothed with the right which she has released.

[24] Witthaus v. Schack, 105 N. Y. 332.

[25] Elmdorf v. Lockwood, 57 N. Y. 322; Johnson v. Montgomery, 51 Ill. 185.

[26] Robinson v. Bates, 3 Met. (Mass.) 40; Tompkins v. Fonda, 4 Paige (N. Y.), 448; Reed v. Ash, 30 Ark. 775; Marvin v. Smith, 46 N. Y. 571.

[27] Croade v. Ingraham, 13 Pick. (Mass.) 33.

[28] Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167.

[29] Mallony v. Horan, 49 N. Y. 111; Locket v. James, 8 Bush (Ky.), 28; French v. Crosby, 61 Me. 502.

The inchoate right of dower, therefore, not being the subject of a conveyance in any of the usual forms by which real property is transferred, and the doctrine of estoppel by which subsequently-acquired titles are made to inure to the benefit of former grantees being inapplicable, it follows that the grantee or mortgagee claiming under an instrument executed by a married woman during coverture acquires no title or interest in the dower of the grantor or mortgagor when the estate becomes absolute, whether dower has been assigned or not.[30] But in all cases where the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against him, and which is not superseded or set aside as against him or his grantee, her right of dower is forever barred and extinguished for all purposes and as to all persons.[31]

Upon the death of the husband the inchoate right of the wife acquired by the marriage becomes absolute; yet she has no estate in the lands of her deceased husband until her dower has been admeasured and assigned,[32] and her rights therein can only be released to the owner of the fee or to some one in privity with the title by his covenants of warranty.[33] After assignment the widow acquires an estate of freehold in the land allotted in severalty, and her life estate therein possesses all the attributes of other estates for life, including the right of alienation.[34]

§ 33. **Curtesy.** Another life estate derived from the common law is that which a husband acquires in his wife's lands by reason of the marital relation, called an estate by the curtesy.[35] Originally this estate was raised only when the

[30] Marvin v. Smith, 46 N. Y. 571; Carson v. Murray, 3 Paige (N. Y.), 483.

[31] Elmdorf v. Lockwood, 57 N. Y. 322.

[32] Johnson v. Montgomery, 51 Ill. 185.

[33] As where the former owner of the fee in land in which dower rights still exist has conveyed the same with warranty, he may purchase the right for the benefit of his grantee, however remote, and thus prevent a breach of his covenants. La Framboise v. Crow, 56 Ill. 197.

[34] Dower is probably the only existing use in which a title that is complete and unopposed by any adverse right of possession does not confer upon the person in whom it is vested the right of reducing it to possession by entry before assignment. Hoots v. Graham, 23 Ill. 81.

[35] The full title of this ancient

husband had issue by the wife; for before that event the husband had only an estate during the joint lives of himself and his wife. The law that a husband who had issue should retain the lands of his deceased wife during his life seems to have prevailed among all the northern nations;[36] and when the customs of the Normans were reduced to writing this law was inserted among them and established in England, probably during the reign of Henry I. The estate is described in the ancient books as "where a man taketh a wife seized in fee-simple, or in fee-tail general, or seized as heir in special-tail, and hath issue by the same wife, male or female, born alive; albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life, by the law of England."[37]

While the right of the husband as tenant by the curtesy has been expressly given by statute in some of the states, and incidentally recognized as an existing legal estate in others, yet in a majority of them tenancy by the curtesy has been abolished, the husband being given a statutory allowance from the deceased wife's estate, the quantity and quality varying in the different states. In many the husband and wife are made statutory heirs to each other; and in such cases the husband takes the same share in the deceased wife's estate which she would, on surviving, take in his; in others the estate has been reduced to extremely meager proportions, and accrues only in such lands as the wife owned at the time of her death, and of which she had made no valid disposition by last will and testament.

By the rules of the common law, marriage, seizin of the wife and birth of living issue were absolutely necessary to the existence of this estate; but these two latter incidents are

estate was "estate by the curtesy of England," and was so called for the reason that, unlike dower, it was not regarded as resting upon any moral foundation, and was therefore granted as a simple curtesy, or an estate by the favor of the law of England. Cruise, Dig. tit. V; 2 P. Wms. 703; Litt. § 35.

[36] Notwithstanding that this estate is derived from the common law it is not peculiar to England, but may be found, more or less modified, in the ancient laws of the other parts of the British islands and the northern continental nations. It has even been held by some writers that the custom may be traced to one of the rescripts of the Emperor Constantine. See 4 Kent's Com. 28.

[37] Litt. § 35.

practically, if not expressly, abolished in every state in the Union. Seizin, as formerly understood, is no longer necessary for the creation or descent of any estate; and marriage, without respect to issue, is sufficient to confer the right if recognized at all.

Subject to the foregoing it may be stated generally that a tenant by the curtesy may convey his estate by deed or incumber it by mortgage,[38] and it seems such estate may be seized and sold on execution to satisfy creditors,[39] though this has been denied.[40]

§ 34. **Homesteads.** To the estates derived from the common law the statute has added another which in its essential characteristics has no analogy in the law. It is called a homestead, and is a constitutionally guaranteed right annexed to land, whereby the same is exempted from sale under execution for debt. In many—perhaps a majority—of the states the homestead right is but a mere privilege of occupancy against creditors, the continuance of which depends upon the continuance of prescribed conditions,[41] but in others it has been raised into an estate, limited only as to its value, and not by any specific degree of interest or character of title in the particular property to which it attaches; and where the worth of the property does not exceed the statutory valuation the estate practically embraces the entire title and interest of the householder therein, leaving no separate interest in him to which liens can attach or which he can alien distinct from the estate of homestead.[42]

As the character of the title is not usually considered material in the creation of homestead estates it follows that it may attach to an equity. Hence, if one has possession of land, under a contract for the purchase thereof, he may impress it with the homestead character the same as if he held the fee. In such event the land in his hands will be held subject only to the lien of the vendor for the unpaid

[38] Forbes v. Sweesy, 8 Neb. 525; Deming v. Miles, 35 Neb. 739; Shortall v. Hinckley, 31 Ill. 219; Mettler v. Miller, 129 Ill. 630.

[39] Deming v. Miles, 35 Neb. 739.

[40] Welsh v. Solenberger, 85 Va. 441.

[41] Brame v. Craig, 12 Bush (Ky.), 404; Casebolt v. Donaldson, 67 Mo. 308; Drake v. Kinsell, 38 Mich. 232; Hill v. Franklin, 54 Miss. 632.

[42] Merritt v. Merritt, 97 Ill. 243.

purchase money, and should he afterwards acquire the legal title, under the terms of the contract, the homestead right will attach thereto and be superior to any claim to the land which accrued after his original acquisition.[43]

The land to which the homestead estate attaches, must, as a rule, consist of one compact body, and while two lots immediately contiguous, the combined area or value of which does not exceed the statutory limit, may be regarded as coming within this rule,[44] yet this is probably as far as it can be made to extend. Two tracts of land which touch only at one point will not, it seems, suffice,[45] nor can the right be claimed in a tract wholly isolated.[46]

The estate of homestead, having been raised by law as a protection to the family, is personal in its character, and exists only in favor of one who already possesses some other recognized estate in the land. It is therefore incapable of alienation except in connection with other interests, but when so joined may be a proper subject of sale, mortgage or release. The interest of the householder, if a married man, is always shared by the wife; and her consent, manifested by a participation in the act of conveyance, is always necessary to complete the devolution of title.

So far as the estate bears resemblance to the common-law estates, its general features are more nearly allied to estates for life; and modern writers, whenever an attempt has been made to definitely locate it, have usually classed it in that category.

§ 35. **Estates for years.** It would seem that after the Norman conquest, while the demesnes of the lords of manors were generally cultivated by their villeins, to whom small tracts of land were allotted for their support and maintenance, to be held at the mere will of the lord, yet as to those persons whose condition was free it became customary to grant them lands for a certain number of years, to be held in consideration of a return of corn, hay or other portion of their crops. By this means they acquired a certain interest in their lands, though

[43] Alexander v. Jackson, 92 Cal. 514; McKee v. Wilcox, 11 Mich. 358; Dortch v. Benton, 98 N. C. 190.

[44] Grimes v. Portman, 99 Mo. 229; Arendt v. Mace, 76 Cal. 315.

[45] Linn Co. Bank v. Hopkins, 47 Kan. 580; Kresin v. Mau, 15 Minn. 119.

[46] Walters v. People, 18 Ill. 194.

much inferior to an estate of freehold; yet notwithstanding this permanent interest their possession was esteemed of so little consequence that they were rather considered as bailiffs or servants of the lord than as having any estate in the land, and their interest might be, and ofttimes was, defeated by a recovery in a real action.[47] A tenant for years was not said to be seized of the land, the possession not having been given to him by the ceremony of livery of seizin; nor did the mere delivery of a lease vest any estate in the lessee, the interest acquired being only a right of entry; but after he had actually entered the estate became vested in him, and he was then possessed, not properly of the land, but of the term of years—the seizin of the freehold still remaining in the lessor.

In its modern aspects the estate for years exhibits but few of the numerous subtleties and refinements which formerly characterized it. It is simple in form and popular in use, and with the exception of the fee is the most common estate known to our law. In its essentials it is a right to the possession of land for a certain specified time, and, unlike estates for life, is never created by act of law, but always by the contract of the parties. It is inferior in rank to a life estate, however long it may last; and, not rising to the dignity of a freehold, is at best but a chattel interest. It is created and perfected by the execution and delivery of a lease for the term, and in this respect differs materially from the old estate of the English law,[48] which required an actual entry. It may be limited to commence presently or *in futuro,* and, unless restricted by the terms or conditions of the grant, may be sold and assigned the same as other real property.

An estate for years may be terminated by expiration of its own limitation, by a surrender of the term prior to that event,

[47] The recoverer was supposed to come in by a title paramount, and therefore not bound by the contracts of the prior possessor. See Greenl. Cruise, tit. VIII, ch. I.

[48] By the common law upon the execution of a lease the lessee acquired an interest called *interesse termini,* which he might at any time reduce to possession by an actual entry, but no estate for years could be created by a lease or other common-law conveyance without an actual entry made by the person to whom the land was granted; for although the grantor had done everything necessary on his part to complete the contract, so that he might never afterwards avoid it, yet until there had been a transmutation of possession by actual entry of the grantee, it

by forfeiture for condition broken, and, in some instances, by merger.

§ 36. **Estates at will and by sufferance.** A tenant at will is one who has no sure or certain estate, but holds at the pleasure of his lessor, who at any time may dispossess him. The tenancy is created only by the entry of the lessee, and may be terminated as soon as commenced. The terms "at will" and "by sufferance" are frequently employed in conjunction to indicate any estate of indeterminate duration depending solely on the pleasure of the landlord; yet, as a matter of law, the interests which they represent are separate and distinct. A tenant by sufferance, technically speaking, is one who, having been originally lawfully invested, continues to hold over after the determination of his estate, and is by the owner suffered to remain in possession.[49] In the former case, the tenant having acquired possession by the consent of the owner, there is between them a privity of estate; in the latter, being much in the nature of a trespass, there is none.

The interest of a tenant at will is the most precarious that can be had in real property; and, because the lessor may determine his will and oust the tenant whenever he pleases, such tenant possesses nothing that can be granted by him to a third person. But although a tenant at will can transfer no rights to another, and a person who assumes to come in under him is only a trespasser, yet if such person claims a right of occupancy by virtue of such an assignment, and such claim is allowed or recognized by the owner of the superior estate, he then becomes a tenant at will the same as his predecessor.[50]

§ 37. **Joint estates.** With respect to the number and connection of the owners, lands may be held in severalty or jointly, the former being where a person holds the same in

lacked the chief mark and indication of his consent, without which he could not be said to be in possession or liable for the use. See Greenl. Cruise, tit. VIII, ch. I.

[49] Tenants at sufferance were not liable by the common law to pay any rent, because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate. Greenl. Cruise, tit. IX. Usually, however, the statute has reversed this, and as a penalty for withholding the property imposes upon the tenant double rent.

[50] Landon v. Townshend, 129 N. Y. 166.

his own right with no other person joined or connected with him in point of interest during the estate therein; the latter where two or more persons take either an estate of inheritance, for life or for years, without any restrictive, exclusive or explanatory words.[51]

Formerly joint estates were divided into those of joint tenancy, coparcenary, and common. Joint tenancy was always created by purchase—that is, by act of the parties—and accrued only by one and the same conveyance; it was characterized by the great underlying principle of unity, which extended both to the interest, the title and possession; and this union and entirety of interest gave rise to another incident called the *jus accrescendi* or right of survivorship. As the right of survivorship was often attended with hardship and injustice, courts of equity at an early day took great latitude in construing against joint tenancies on the ground of intent, while by statute in the United States the general rule is that all estates vested in two or more persons are to be deemed tenancies in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate. Estates in coparcenary are practically unknown in this country. They arose through a peculiar provision of the English law of descent, and were raised only in case of female heirs.[52]

A tenancy in common was formerly created where two or more persons held lands by several titles, and not by a joint title; and from the fact that they were all permitted to occupy the land, they were called tenants in common. The only unity required was that of possession, and it mattered not that one held his estate in fee and the other for life; or that one derived his title through purchase and the other through descent; and the estates might commence at any time without reference to each other. Substantially all of these incidents have been preserved, but with the further addition

[51] The law will interpret a grant of this kind so as to make all its parts take effect, which can only be done by creating an equal interest in all the persons who take under it.

[52] As where a person seized of land died, leaving only daughters or other female heirs, the estate descended to all such daughters jointly, and they were said to hold in coparcenary, and to make but one heir to the ancestor. 1 Greenl. Cruise, tit. XIX, sec. 1.

that, by statute, in most of the states, all grants and devises of lands made to two or more persons are construed to create estates in common and not in joint tenancy.[53]

Tenants in common are seized of each and every part of the property; but it is not in the power of one to convey the whole of the same, or the whole of a distinct portion thereof, or to give a license to do any act which will work a permanent injury to the inheritance or lessen the value of the estate.[54] Yet as the freeholds are several and distinct, with no privity of estate between the tenants, each of the individual interests may be sold and conveyed to a stranger;[55] and, as property indivisible in its character is incapable of several possession by each tenant, it therefore follows that the possession of one is a constructive possession of the others, and when one of the tenants not in the actual possession makes a sale of his interest in the property, the purchaser succeeds to all the rights of the vendor as held by him, without an actual delivery of possession.[56]

As stated above, a co-tenant cannot make an effective conveyance of any specific part of the common property. But such a conveyance, or attempted conveyance, will not be void and it has been held in a proceeding of this kind that, while the deed may be ineffectual as a conveyance of a specific part it may yet be allowed an operation as a conveyance of an undivided interest, and where the parcel designated by metes and bounds, or other specific designation, does not exceed in area and value the interest of the grantor, the deed may, as against him, be treated as a conveyance of his entire interest in the common land.[57]

§ 38. **Estates by entirety.** Another of the joint estates derived from the common law is that which is created when a conveyance is made to husband and wife which does not state the manner in which they shall hold the land, and which

[53] An exception is generally made in respect to mortgages and to devises or grants made to executors, or to husband and wife.

[54] Mattox v. Hightshue, 39 Ind. 95; Shepardson v. Rowland, 28 Wis. 108; Hartford, etc. Ore Co. v. Miller, 41 Conn. 112; Murray v. Haverly, 70 Ill. 318. Compare Barnhart v. Campbell, 50 Mo. 597.

[55] Butler v. Roys, 25 Mich. 53; Shepherd v. Jernigan, 51 Ark. 275.

[56] Brown v. Graham, 24 Ill. 628; Fischer v. Eslaman, 68 Ill. 78.

[57] Young v. Edwards, 33 S. C. 404.

is denominated a tenancy by entirety. The conveyance in such case does not constitute them either joint tenants or tenants in common; for they are, in legal contemplation, but one person, and hence unable to take by moieties. Both would therefore be seized of the entirety; neither could dispose of any part of the estate without the assent of the other, and upon the death of either the whole estate would remain in the survivor. This rule has not been materially changed by statute, and is accepted in a majority of the states.[58] In such an estate there can be no partition, as neither has any separate interest. Between them there is but one owner; and that is neither the one nor the other, but both together. The common law, it would seem, permitted the husband, for his own benefit, during their joint lives, to use, possess and control the land and take all the profits thereof, and even to mortgage and convey an estate during such joint lives, though he could make no disposition of the land that would prejudice the right of the wife in case she survived him; but the later and apparently better-considered cases hold that, from the peculiar nature of this estate and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying and incumbering it.[59]

In several of the states where the rule formerly prevailed it has been held that the legal unity of husband and wife has been broken by the "married women's" acts, and that they take only as tenants in common.[60] But estates which had vested prior to the acts in question are not affected, changed or modified by them. They remove no disabilities and confer no new rights in relation to such estates, which can only be conveyed or incumbered by the joint act of both parties, while the survivor takes an absolute title to the whole in case of death, as heretofore.[61]

[58] Arnold v. Arnold, 30 Ind. 305; Hemingway v. Scales, 42 Miss. 1; Washburn v. Burns, 34 N. J. L. 18; McCurdy v. Canning, 64 Pa. St. 39; Fisher v. Provin, 25 Mich. 347; Garner v. Jones, 52 Mo. 68; Robinson v. Eagle, 29 Ark. 202; Marburg v. Cole, 49 Md. 402; Hulett v. Inlon, 57 Ind. 412; Bertles v. Nunan, 92 N. Y. 152; Meyers v. Reed, 17 Fed. Rep. 401.

[59] Chandler v. Cheney, 37 Ind. 391; Hulett v. Inlon, 57 Ind. 412; McDuff v. Beauchamp, 50 Miss. 531.

[60] Hoffmann v. Stigers, 28 Iowa, 302; Clark v. Clark, 56 N. H. 105; Cooper v. Cooper, 76 Ill. 57; Walthall v. Goree, 36 Ala. 728.

[61] Harrer v. Wallner, 80 Ill. 197.

A review of the statutes shows that the legislation of the states concerning the property rights of married women has been very uniform, but the judicial construction of similar statutes has been variant and contradictory. In some instances, as has been observed, courts have decided that statutes making joint grantees tenants in common, and giving to married women the same rights in property as though they were sole, have effectually destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes; but in a majority of the states the declared effect of these statutes has been confined to their express terms, and they have been held to have no relation to or effect upon real estate conveyed to husband and wife jointly, and that, notwithstanding these statutes, they still take as tenants by the entirety.[62]

There is nothing, however, in the theoretic unity of husband and wife which prevents them from holding moieties of the same estate. The question as to the character in which they take must be decided by the terms of the instrument, and if the intention of the donor, as appears thereby, is that they take in common such intention must prevail.[63] A married woman may, of course, take and hold real property as a joint tenant or tenant in common with her husband,[64] and where by the provisions of the deed it clearly appears that the intent was to convey to her not merely as a wife, but to hold in her own right as an individual, then by virtue of such individual right she will have the power to dispose of her interest independent of her husband.[65]

As the estate by entirety originated in and depends upon the marital relation, it logically and consistently follows that it may be destroyed by a legal separation of the spouses, and so, it has been held that where the legal unity has been broken by a divorce the title to the land theretofore acquired and held by them in entirety will thereupon vest in them as tenants in

[62] See Bertles v. Nunan, 92 N. Y. 152; Farmers', etc. Bank v. Gregory, 49 Barb. (N. Y.) 155; Bates v. Seeley, 46 Pa. St. 248; Robinson v. Eagle, 29 Ark. 202; McDuff v. Beauchamp, 50 Miss. 531.

[63] Miner v. Brown, 133 N. Y. 308.

[64] Robinson, appellant, 88 Me. 17; Cooper v. Cooper, 76 Ill. 57; Hoffman v. Stigers, 28 Iowa, 307.

[65] Jooss v. Fly, 129 N. Y. 17; and see Brown v. Baraboo, 90 Wis. 15; Hunt v. Blackburn, 128 U. S. 464.

common.[66] This view has been expressly denied, however, in some states and the doctrine announced that after the estate has once vested it becomes absolute and is not destroyed nor affected by the subsequent divorce of the grantees.[67]

It would also seem that, notwithstanding the peculiar features of this species of estate, either spouse may transfer his or her interest to the other. Nor can this be properly regarded as a violation of the original grant since its primary object is that each may be secure against an impairment of rights through the act of either. Where this course is permitted the effect is to convert the estate into a severalty in fee which the owner may alien or incumber in like manner as other property.[68]

§ 39. **Contingent interests and estates.** Any or all of the foregoing enumerated estates may be classified as vested or contingent; and while sales and conveyances are usually made with reference to vested rights, it is not uncommon for parties to contract with reference to estates to be acquired in the future and resting wholly upon a contingency. In a very few instances the legal right to so contract has been denied, and courts have refused to give effect to contracts so made, particularly in the case of sales of expectancies by presumptive heirs. But even where deeds of this character can have no operation at law as grants, yet in equity it is well settled that an instrument which purports to convey property which is in expectancy, or to be subsequently acquired, or which is not of a nature to be grantable at law, although inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to the intent, if supported by valid considerations, whenever the grantor is in a condition to give it effect.[69]

It was a rule at common law, that both contingent remainders and executory interests were only possibilities, and, therefore, not assignable, though it seems they might, as possibilities coupled with an interest, be devised by will, or

[66] Donegan v. Donegan, 103 Ala. 537; Engeart v. Kepler, 118 Ind. 488; Stelz v. Shreck, 128 N. Y. 263; Russell v. Russell, 122 Mo. 235; Hopson v. Fowkes, 92 Tenn. 697.

[67] Appeal of Lewis, 85 Mich. 340.

[68] Donahue v. Hubbard, 154 Mass. 34.

[69] Bailey v. Hoppin, 12 R. I. 560; and see Jackson v. Bradford, 4 Wend. (N. Y.) 619.

they might be released by a conveyance operating by way of estoppel. Yet it would also seem that contracts and assurances relating to such interests, given for a valuable consideration, might be enforced in equity, and, at the present time, even where the common law rule as to assignability of such interests prevails, it is well settled that where the contingency upon which the remainder is to vest is not in respect to the person, but to the event, where the person is ascertained who is to take if the event happens, the remainder may be granted and the grantee will occupy the place of the grantor with his chance of receiving the estate.[70]

Contingent remainders are not favored, and, unless it clearly appears from the language creating the estate that it is intended to be contingent, the estate will be regarded as vested.

§ 40. **Expectancies and naked possibilities.** Closely related to the subjects treated in the foregoing paragraph, and partaking in some measure of their essence, are mere expectancies and naked possibilities not founded upon a right or coupled with an interest. The law in respect to this class of interests, if indeed they can justly be regarded as interests, is variant and uncertain. At common law the rule is absolute that such interests are not assignable and this rule has repeatedly been applied in this country.[71] But opposed to this is a modern equitable doctrine, the principles of which are as yet somewhat uncertain, which supports assignments of expectancies as grants operating not *in presenti* but rather as present contracts to take effect *in futuro* and as soon as the subject matter shall have come into or have a potential existence.[72] This view now seems to be sustained by the volume of authority.[73] The conveyance, if sustained by an

[70] Barthalomew v. Muzzy, 61 Conn. 387; Smith v. Pendell, 19 Conn. 112; Grayson v. Tyler's Admr., 80 Ky. 363.

[71] McCalls Admr. v. Hampton, 98 Ky. 166; Alves v. Schlesinger, 81 Ky. 290; Hart v. Gregg, 32 Ohio St. 502; Skipper v. Stokes, 42 Ala. 255; Patterson v. Caldwell, 124 Pa. St. 455.

[72] Mitchell v. Winslow, 2 Story (c. ct.) 630.

[73] Lewis v. Madison, 1 Munf. (Va.) 303; Bacon v. Bonham, 33 N. J. Eq. 614; Bishop v. Davenport, 58 Ill. 105; Varick v. Edwards, 1 Hoff. ch. cas. (N. Y.) 382; Hale v. Hollon, 90 Tex. 427.

adequate consideration, is considered as an executory agreement to convey or as a covenant for a future conveyance.[74]

§ 41. **Powers.** A power, technically speaking, is not an estate, but is a mere authority, enabling a person, through the medium of the statute of uses, to dispose of an interest in real property vested either in himself or in another person.[75]

[74] Baylor v. Comr., 40 Pa. St. 37. [75] Burleigh v. Clough, 52 N. H. 267.

Art. III. The Title.

§ 42. Title generally considered.
43. Classification.
44. Methods of acquisition and disposal.
45. Derivation and nature of title.
46. Marketable title defined.
47. Derivative title—Descent.
48. Continued—Purchase.
49. Tax titles.
50. Color of title—Adverse possession.
51. The right to the possession of title deeds.

§ 42. **Title generally considered.** The property or interest which a person may have in lands, tenements or hereditaments, as has been shown in the preceding article, is described in the comprehensive term *estate*; the method of acquiring and right of holding same is denominated *title*. Title, therefore, is properly an incident of estates; and although it is customary in speaking of the transfer of real property to allude to a sale of the title, yet as a matter of fact the title itself is not really sold, nor does it form in any proper sense of the term a subject of barter or sale. The title regularly devolves with a sale of the estate; and no matter how many outstanding titles or claims of title there may be, they all rest upon some species of estate, and as the estates merge the titles vest by operation of law. The title is inseparably connected with the estate, and represents the right or authority for the enjoyment of land, even as the estate represents the quality and extent of such enjoyment.

But while title, in itself, is not the subject of conveyance by the ordinary forms prescribed by law and only follows the estate as an incident, it is nevertheless an essential and dominating consideration in nearly every transfer of land; and although nothing may have been said concerning the title during the negotiations attending the sale, the law presumes that it entered into the contemplation of the parties at that time, and raises an implied promise on the part of the vendor that he possesses title, and that it is of such a character as to assure the vendee of a quiet and peaceable enjoyment of the property.[1] In common parlance this is called a "marketable title."

[1] Delevan v. Duncan, 49 N. Y. 390; Flynn v. Barber, 64 Ala. 193; 485; Holland v. Holmes, 14 Fla. Woodruff v. Thorne, 49 Ill. 88;

It is competent for the parties to stipulate as to the character of the title, and their agreements in this respect will be given a controlling efficacy on all questions subsequently arising; but in the absence of such stipulations, or of proper evidence of an agreement respecting title, a marketable title is always presumed, and the purchaser will never be compelled to accept any other.[2] The right to such a title is inherent in the transaction; it does not grow out of the agreement, but is given by law, and such title may be demanded by the purchaser as a matter of legal right.[3]

§ 43. **Classification.** Titles may be classified as *legal* and *equitable*—a distinction originally applied only to estates, but now extensively used to designate the manner of acquiring and holding them as well. The equitable title usually carries with it the beneficial interest in the land, together with the incidents of ownership, the legal title being held as a mere naked trust; this is illustrated in the relations of the government and a purchaser of public land before patent issues; a grantee under a land contract after payment made and before execution of deed; or where the legal title has been conveyed to a trustee, the equitable ownership vesting in the beneficiary or *cestui que trust.*

Custom has also introduced another species of classification, based on the impairments or defects which may exist in the title asserted by the vendor, by which the title is said to be bad, doubtful, good or perfect; the latter two classes being also known as marketable titles, or those which a court of equity considers so clear that it will enforce their acceptance by a purchaser. A doubtful title, on the contrary, is one that a court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to

Moulton v. Chafee, 22 Fed. Rep. 26. If the agreement does not mention the title to be given, an implication arises that it is to be free from incumbrances; Newark Savings Institution v. Jones, 37 N. J. Eq. 449.

[2] Mitchell v. Steinmetz, 97 Pa. St. 254; Chambers v. Tulane, 9 N. J. Eq. 146; Powell v. Connant, 33 Mich. 396; Taylor v. Williams, 45 Mo. 80; Ludlow v. O'Niel, 29 Ohio St. 182; Gill v. Wells, 57 Md. 492.

[3] Lounsbury v. Locamber, 25 N. J. Eq. 554; Moulton v. Chafee, 22 Fed. Rep. 26.

The reader is referred to the chapters on "Rescission" and "Specific Performance," where the subject is considered in detail.

be compelled to accept it. The doctrine of marketable titles is purely equitable and of modern origin; at law every title is marketable.

The terms "bad" and "good," as used in this connection, cannot be said to have any legal significance, for, notwithstanding their constant employment, the law does not recognize any degrees of title. They may be considered as colloquial expressions which by frequent iteration have gained a certain currency in the language of the law. Title is simply title; the muniments by which it is sought to be asserted may be defective and for that reason the title may be considered doubtful, but there is no good, better or best in title, while a bad title is no title at all.

§ 44. **Methods of acquisition and disposal.** Elementary writers all agree that there exists but two modes of acquiring title, which they denominate respectively *descent* and *purchase;* the latter term including every legal method of acquisition except that by which an heir, on the death of an ancestor, succeeds to the estate of the latter by operation of law.[4]

Descent, or hereditary succession, was by the common law considered the better title; and when the right of inheritance is fully established by strict compliance with the law relating to descents, proof of heirship, etc., the title thus conferred is of the highest dignity and effectual for all purposes. But though the title vests in the heir by operation of law immediately on the death of the ancestor, yet purchasers desire and should have affirmative evidence that the person asserting the same is justified in so doing; and, in the absence of probate proceedings or a judicial determination of the rights of the heirs, titles depending on descent are to be viewed with jealousy and accepted with the greatest caution, and particularly is this the case where title is asserted by descent by an heir in a remote degree from the intestate or common ancestor.

Purchase, as has been stated, is a generic term which includes every mode of coming to an estate except by inherit-

[4] The common-law estates of dower and curtesy have been regarded by some as properly coming within the doctrine of descents; and the statutory regulations of many of the states would strongly seem to favor this view. Others have made a distinction in respect to estates acquired by purchase, between titles created by act of law and those by act of the parties.

ance,[5] though in its more limited sense it is applied only to the acquisition of lands by way of bargain and sale for money or other consideration.[6] Neither law-writers nor courts seem to have ventured on a more extended definition, if indeed one can be framed; and the one above given has come down unchanged from Blackstone, who in turn borrowed it from earlier writers. There are four principal methods recognized of acquiring title by purchase, to wit: by deed, devise, prescription or limitation and escheat.[7] To these may be added title accruing through operations of nature; as accretion, reliction and avulsion, as well as such as result from our political and civil relations; as eminent domain, confiscation and forfeiture. Some writers still further extend the list by the addition of abandonment, occupancy and estoppel. The two former of these are not known in the United States, while the latter is not, strictly speaking, a method of acquiring title at all, but simply a recognition of existing titles.

§ 45. **Derivation and nature of title.** The king, as the head and sovereign representative of the nation, is by the English law the original proprietor or lord paramount of all the land in the kingdom, and the true and only source of title. From the crown all the lands in the realm are held, either mediately or immediately, by a tenure, of which fealty is the great characteristic. This doctrine grew out of the feudal system, by which fealty was inseparably incident to the reversion, and could never be lost to the ultimate lord. With the assumption of independence, the state, in its sovereign capacity, succeeded to the titles of the king and became the proprietor of all the lands, and hence all valid individual title is derived only from the grant of the federal government; from the state government; or from foreign powers either prior to the Revolution, or the subsequent acquisition of the territory by the government, the vested rights of the land-owner being recognized in the latter case by treaty at the time of the cession or by subsequent confirmation. But the state does not lend its lands, like a feudal lord, nor has it any tenantry. Its patents stipulate for no fealty or other feudal incident; and though

[5] Green v. Blanchar, 40 Cal. 194.

[6] 2 Bouv. Law Dict. 395; Cruise, Dig. tit. 30.

[7] In its original form escheat was a species of reversion; in its present form it is quite distinctly a method of descent, the state taking as an ultimate heir in default

title can be deduced only from the sovereign—the state—by direct grant or confirmation, yet when so acquired it is held in pure and free *allodium,* being the most ample and perfect interest that can be obtained in land, and denoting a full and absolute ownership, with no duties to a superior lord, or services or fealty incident thereto.[8]

§ 46. **Marketable title defined.** Unless there has been some express stipulation as to the character of the title to the estate to be conveyed, a marketable title is always presumed;[9] and unless this fact can be satisfactorily established by the vendor, the vendee will not be compelled to complete the purchase or pay for the land.[10] As a general rule, a title which is open to judicial doubt is not marketable,[11] although what is sufficient ground for a judicial doubt cannot be conclusively reduced to fixed and determinate principles, as it depends to a considerable degree upon the discretion of the court.[12] In no case, however, will a purchaser be compelled to accept a property which he can only acquire in possession by litigation and judicial decision;[13] nor one the possession of which he must thus defend,[14] or which would expose him to the hazard of a law-suit.[15] Property subject to incumbrance can never be imposed upon the purchaser unless he has so agreed;[16] but the mere fact of incumbrance does not necessarily defeat the vendor's title, nor in any proper sense render it unmarketable when the incumbrance is of such a character as to admit of easy removal.

§ 47. **Derivative titles—Descent.** Title by descent, though

of known kindred. For many years, however, it has been classed as a form of purchase and is usually so treated by the elementary writers.

[8] See Warvelle on Abstracts of Title, Chap. II *passim*, for a full discussion of this subject.

[9] Powell v. Conant, 33 Mich. 396; Freetly v. Barnhart, 51 Pa. St. 279; Taylor v. Williams, 45 Mo. 80.

[10] Ludlow v. O'Neil, 29 Ohio St. 182; Richmond v. Gray, 3 Allen (Mass.), 27; Gill v. Wells, 59 Md. 492.

[11] Shriver v. Shriver, 86 N. Y. 575.

[12] Aston v. Robinson, 49 Miss. 348; Quinn v. Roath, 37 Conn. 16.

[13] Butts v. Andrews, 136 Mass. 221; Charleston v. Blohme, 15 S. C. 124.

[14] Shriver v. Shriver, 86 N. Y. 575.

[15] Dobbs v. Norcross, 24 N. J. Eq. 327; Walsh v. Barton, 24 Ohio St. 28. See chapter on Specific Performance.

[16] Chambers v. Tulane, 9 N. J. Eq. 146.

for practical purposes regarded as a new title springing from the death of the ancestor, and which, when asserted, must be so proved, is in reality but a continuation of the ancestor's title which the law casts upon the heir at the moment of the ancestor's death.[17] The heir is regarded in law as the legal appointee to receive the title, and this appointment he can neither disclaim nor avoid. The title of the heir, therefore, is not so much an acquisition as a succession. The death of the ancestor does not create a title, but rather confirms in the heir that which was previously inchoate, uncertain and defeasible. It was a part of the contract in the original grant from the state that the grantee and his heirs might hold, possess and enjoy the land; and unless the ancestor has exercised the power of alienation in his life-time, the heir, upon his death, succeeds to his rights in virtue of the original agreement, as strictly as though the power of alienation did not exist.

The right thus acquired by the heir, upon the death of the ancestor, is a vested interest, which he may immediately convey by deed,[18] the grantee standing in his place and holding the land as he did, subject to the lien, if any, of the administrator.[19]

§ 48. **Continued—Purchase.** While descent is strictly a succession, purchase, although equally so in legal theory, is usually treated as an assignment. Indeed all purchasers by deed, devise, or other act of the parties, are classed as assigns. The title so acquired depends for its validity not only on the regularity of the method of devolution, but also on the rights of the assignors, for the title asserted by a purchaser is only a continuation of that of his vendor. These matters are generally disclosed by the muniments, or the operative instruments of conveyance that constitute the chain of title.

There is practically no difference in respect to the status of an heir and a beneficial assignee. The title of either is subject to the same incidents and equities that affected it in

[17] The term "ancestor," when used with reference to the descent of real property, embraces all persons, collaterals as well as lineals, through whom an inheritance is derived. Wheeler v. Clutterback, 52 N. Y. 67.

[18] Hubbard v. Rickart, 3 Vt. 207; Walbridge v. Day, 31 Ill. 379.

[19] Austin v. Bailey, 37 Vt. 219; Van Syckle v. Richardson, 13 Ill. 171; Cockerel v. Coleman, 55 Ala. 583.

the hands of the ancestor or assignor. But a purchaser for value and without notice takes the land unaffected by latent equities, and his title is unimpeachable for such causes.

§ 49. **Tax titles.** It is a fundamental proposition that all property is subject to a just proportion of the burdens of taxation in return for the protection which the state affords. A tax is in one sense a personal debt, and may be collected by any of the legal methods provided by law, should the state choose to resort to such remedies; yet it is not an ordinary debt, for it takes precedence of all other demands, and is a specific charge upon the property against which it is assessed, without reference to the matter of ownership. In case of non-payment of the debt, the state, in the exercise of the perpetual lien which by virtue of its sovereignty it possesses upon all taxable lands within its limits, may seize and sell the land charged with the tax, although there may be prior liens and incumbrances upon it, and thus enforce payment to the exclusion of all other creditors.

The title raised by such sale is a purely technical as distinguished from a meritorious title, and depends for its validity upon a strict compliance with all the requirements of law.[20] If the land claimed under such a title was subject to taxation, and the proceedings under the law have been regular, and the owner has failed to redeem within the time limited by law, then the whole legal and equitable estate is vested in the purchaser, and a new and perfect title is established;[21] but no presumption can be raised to cure radical defects in the pro-

[20] Altes v. Hinckler, 36 Ill. 265; Hewes v. Reis, 40 Cal. 225; Rivers v. Thompson, 43 Ala. 633.

[21] Smith v. Messer, 17 N. H. 420; Dunlap v. Gallatin Co. 15 Ill. 7; Jarvis v. Peck, 19 Wis. 74; Cram v. Cotting, 22 Iowa, 411. The following principles or rules for testing the validity of tax titles appear to be fairly deducible from the reported cases: (1) Where the statute under which the sale is made directs a thing to be done, or prescribes the form, time and manner of doing anything, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with. (2) But in determining what is required to be done, the statute must receive a reasonable construction; and where no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient. Hall, J., in Chandler v. Spear, 22 Vt. 388.

ceedings, and the proof of regularity devolves on the person asserting the title.[22]

A tax title, though bearing some resemblance to titles derived under judicial and execution sales, differs in this: that the latter are strictly derivative titles, and dependent not only on the legality of the procedure of transfer but upon the acts of former owners. A tax title, on the contrary, from its very nature, has nothing to do with the previous chain of title, nor does it in any way connect itself with it. The person asserting it need go no further than this tax deed, and the former title can neither assist nor prejudice him. The sale operates upon the land and not upon the title; and it matters not how many different interests may have been connected with the title; if it has been regularly sold, the property, accompanied by the legal title, goes to the purchaser. No covenant running with the land, nor warranty, or other incident to the title, as a title, passes to the purchaser, but he takes it by a new, independent and paramount grant, which extinguishes the old title and all the equities dependent upon it.[23] The statute usually pronounces the new title thus acquired a fee; but this would legally follow, even though the statute were silent, where no other estate is reserved in the deed. It must be understood, however, that the clause of the statute which provides that a conveyance resulting from a sale shall vest in the grantee an "absolute estate in fee-simple" does not mean that such estate shall vest in the grantee notwithstanding the fact that the law had not been complied with in making the sale, but refers merely to the quantity of the estate conveyed as distinguished from a lesser estate.[24]

Owing, however, to the complexity of the procedure employed in the enforcement of tax levies, the many errors which often attend it, as well as the grave questions which may arise even on perfect service, a tax title is regarded as among the poorest evidences of the ownership of land, and is always taken with suspicion and viewed with jealousy. When

[22] Oliver v. Robinson, 58 Ala. 46.

[23] Neiswanger v. Gwynne, 13 Ohio, 74; Ross v. Barland, 1 Pet. (U. S.) 664. See Warvelle on Abstracts of Title, p. 551 *et seq.*, for a discussion of this subject.

[24] Steeple v. Downing, 60 Ind. 478.

a tax deed is relied upon as the foundation of title, all the antecedent steps become material.[25]

§ 50. **Color of title—Adverse possession.** A person is properly said to have color of title to lands when he has an apparent though not a real title to the same, founded upon a deed which purports to convey them to him;[26] and a claim to real property under such a conveyance, however inadequate it may be to carry the true title, or however incompetent the grantor may be to convey such title, is strictly a claim under color of title.[27] Possession under color of title for the period of statutory limitation confers upon the holder a perfect title in law; and where one takes possession under a deed giving color of title, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period, the operation being technically called tacking.[28] Titles acquired in this manner must, however, show connected possession and a privity of grant or descent. Those who hold lands independently of previous holders, their several possessions having no connection, cannot so tack their possession as to avail themselves of that which has gone before.[29]

§ 51. **The right to the possession of title deeds.** It was the invariable custom in former years and before the passage of the registration acts, upon all sales of real property, for the vendor to produce and give to the vendee the patents and deeds through which he deraigned title. The possession of the complete chain of title deeds was the evidence which the vendor produced of his ownership; and on a sale the entire series passed to the purchaser, as well for the purpose of showing ownership in the vendor as that the vendor should have no evidence of title remaining whereby he might be able

[25] In many of the states the tax deed is now received as presumptive evidence of the regularity of the antecedent proceedings, and in controversies concerning the tax title the burden of proof is thrown upon the assailing party.

[26] Seigneuret v. Fahey, 27 Minn. 60; Rigor v. Frye, 62 Ill. 507; Hall v. Law, 102 U. S. 461.

[27] Edgerton v. Bird, 6 Wis. 527; Hinkley v. Greene, 52 Ill. 223; Ford v. Wilson, 35 Miss. 504.

[28] Cooper v. Ord, 60 Mo. 420; Alexander v. Stewart, 50 Vt. 87; Haynes v. Boardman, 119 Mass. 414.

[29] Crispen v. Hannavan, 50 Mo. 536; Marsh v. Griffin, 53 Ga. 320; Pegues v. Warley, 14 S. C. 180.

to effect a second and fraudulent sale. But the possession of the deeds of conveyance is now comparatively of small importance, as the public records disclose to purchasers the true condition of the title, and furnish them, in most cases, with all the information necessary or desirable to a full and thorough understanding as to past and present ownership. For this reason title deeds are seldom demanded and rarely furnished; and so implicit has become the reliance of the people upon the public records, that only in exceptional instances are title deeds preserved.

But, though the possession of deeds has become of minor importance, the legal right to them has not probably changed. From a very early period chancery compelled the delivery of deeds when necessary; and there can be but little doubt that a person properly entitled to their custody may still come into equity and obtain a decree for a specific delivery of them if they be wrongfully withheld.[30]

[30] Wilson v. Rybolt, 17 Ind. 391.

CHAPTER II.

THE PARTIES.

ART. I. PERSONS SUI JURIS.
ART. II. PERSONS UNDER DISABILITY.
ART. III. PERSONS INCOMPETENT.
ART. IV. FIDUCIARIES.

ARTICLE I. PERSONS SUI JURIS.

§ 52. Generally.
53. Vendors.
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64. Corporations.
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68. Death of contracting party—Executors and administrators.

§ 52. Generally. It is an elementary principle that to every legal contract there must be two contracting parties competent to contract. This is an indispensable element; and while every other essential requisite may be present, if lacking in this particular, the contract is without validity and incapable of legal enforcement. The legal capacity to bind oneself to do that which he has agreed to do must exist; and even where the obligation arises wholly from implication, or where only passive acquiescence is required, the capacity to act, to receive, or to become invested, agreeably to prescribed legal forms, must be present and enter into the contract as one of its constituent and indispensable elements.[1]

§ 53. Vendors. There must be to every grant a grantor, a grantee, and a thing granted. The latter has been considered in the preceding chapter, and the former will constitute the

[1] See Winslow v. Winslow, 52 Ind. 1; State v. Killian, 51 Mo. 80. Ind. 8; Musselman v. Cravens, 47

subject of the succeeding paragraphs of this. If a conveyance of land has resulted as the effect of a preliminary treaty, and represents the consummation of a contract previously made and concluded, it must be the intelligent and capable act of the parties on either side; if it has been induced by other motives, or if the grantor has assumed to act without the actual concurrence of the vendee, it must still, so far as he is concerned, be the result of the exercise of free will, made by one who is capable of comprehending the nature and effect of what he has done. A vendor, therefore, to successfully accomplish the contractual undertaking, must possess the mental capacity to give the necessary legal assent; should possess the requisite legal age to render his engagements binding, and should rest under no disability depriving him of legal capacity. Possessed of these qualifications he may make any disposition of his property that his judgment, fancy or caprice may prompt, provided that in so doing he contravenes no rule of law or principle of equity; and, in some cases, even though lacking in legal capacity, whether through inadequacy of age or legal disability, his grants are only voidable, and not, for these reasons, void.

§ 54. **Vendees.** The foregoing remarks concerning the vendor may in many particulars be applied to the vendee. The law presupposes that every contract is the intelligent act of the parties to it, entered into upon a fair understanding of its purport, and consummated with a knowledge of its effects. Yet in the conveyance of land it often happens that the vendee is but a passive recipient, with no voice, and even without mind. The conveyance may have been none of his seeking, and at the time of its execution unknown to him; and while neither the burdens nor advantages of property can be thrust upon a person without his assent, yet as the possession of property is so universally considered a benefit the absence of express dissent is ordinarily presumed to indicate assent and concurrence.[2]

It is, of course, essential to the validity of every conveyance that it be to a grantee capable of taking and of proper identi-

[2] Mitchell v. Ryan, 3 Ohio St. 300; Bundy v. Iron Co. 38 Ohio St. 287. Davenport v. Whistler, 46 Iowa, 377; Bivard v. Walker, 39 Ill. 413;

fication; yet far less strictness is required as to capacity, etc., in grantees than in case of grantors, and few of the disabilities which may encompass the latter are applicable to the former. Coverture, infancy, lunacy, etc., while they might interfere with a contract of sale, will yet form no bar to a conveyance, and persons laboring under such disabilities may take and hold by a grant equally with a person *sui juris*.

§ 55. **Parent and child.** Probably none of the relations of life are subject to greater scrutiny, in all matters relating to contracts and conveyances of land, than that existing between parent and child. The intimate character of the relationship necessarily involving many features that are utterly wanting outside of such relation, and the facility which such relation affords for the commission of fraud, both with respect to the parties and third persons, has necessitated this vigilance on the part of courts, and in some particulars created a code of law applicable to no other class.

With respect to their contracts with each other, where both stand upon an equal footing and both possess the requisite capacity, they are not distinguishable from others; and most of the decisions involving the relation have arisen in cases of tender years on the one hand or old age and decrepitude on the other, and nearly all have turned upon the question of fraud.

The law has always preserved a marked distinction between the children of a grantor and a stranger; and while the parent has no right to make voluntary gifts or donations to his children to the disadvantage of his creditors or others having legal or equitable claims upon him with respect to his property, yet he may invest them with the title to property suitable to their circumstances and condition in life if there be no actual or constructive fraud.[3] And such conveyances, notwithstanding the want of a valuable consideration, are always regarded as meritorious.

So, also, though a parent is entitled to the services of his children while under age, he may nevertheless waive his right and make such services the consideration of a contract or promise, and may in good faith transfer property in the per-

[3] Salmon v. Bennett, 1 Conn. 525; Nichols v. Ward, 1 Head (Tenn.), 323.

formance of such obligation without its being subject to a claim on the part of the other children to consider it in the light of an advancement.[4]

§ 56. **Expectant heirs.** As a rule, all contingent and executory interests and contingent estates of inheritance, or any other species of estate where there is a present existing right, although to take effect in the future, and even then only on a contingency, are proper subjects for contract and sale.[5] But as a conveyance or grant, to be effective, must be founded on an existing right, vested or contingent, it necessarily follows that in the case of a naked or remote possibility, or what the law terms a possibility on a possibility, a grant or attempted grant, as such, would be inoperative and void.[6] The word "possibility," as used in this connection, has a specific meaning in law, and is distinguished from its broader signification, where it might properly include contingent and executory interests which are objects of limitation, and denotes nothing more than simple expectation—a mere hope of succession, unfounded in any limitation, provision, trust or legal act of any kind. It is in this sense that the word is used to characterize the expectancy of an heir, apparent or presumptive.

From a very early day the law has refused to sanction or give effect to the conveyance of a naked possibility, or a possibility not coupled with an interest, even though made for a valuable consideration, and this principle has been retained in American jurisprudence.[7] Contracts or grants by an heir apparent come strictly within this rule and are denied legal effect not only for the reasons just assigned, but on the further ground that such attempted dispositions are frauds upon the ancestor and contrary to public policy.[8] That is, if the ancestor has no knowledge of the contract he may permit his property to pass under the law of descent, believing that his chil-

[4] Murrel v. Murrel, 2 Strob. Eq. (S. C.) 148.

[5] Woods v. Williams, 9 Johns. (N. Y.) 123; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110.

[6] Hart v. Gregg, 32 Ohio St. 502; Boynton v. Hubbard, 7 Mass. 112; Baylor v. Commonwealth, 40 Pa. 37; McDonald v. McDonald, 5 Jones, Eq. (N. C.) 211; McCall v. Hampton, 98 Ky. 166.

[7] McCall v. Hampton, 98 Ky. 166; Skipper v. Stokes, 42 Ala. 255; Patterson v. Caldwell, 124 Pa. St. 455; Needles v. Needles, 7 Ohio St. 432.

[8] McClure v. Raben, 133 Ind. 507. And see p. 56, *ante*.

dren or heirs will receive the benefit thereof, when, in truth, it may go to an entire stranger if the contract is allowed to have effect. By keeping him ignorant of the facts he is thus induced to leave his property to one he never intended without his knowledge or consent. This, the courts hold, is a fraud upon him, and a violation of his rights of disposition, which vitiates the contract.[9] In any event all such contracts are regarded by the law with disfavor, and generally one who attempts the enforcement of same must allege and prove that there was neither fraud nor oppression.[10]

Notwithstanding, however, that the conveyance of an expectancy, as such, is in effect a transfer of a mere naked possibility, and hence inoperative at law to pass any estate or interest in the land, yet, when made *bona fide* and for a fair consideration, it will, it seems, be upheld in equity and enforced as an executory agreement to convey.[11] In a very few instances this has been denied,[12] but the growing tendency seems to be the other way and the weight of authority sustains the views here given. Nor is there anything inconsistent in such rule, for if the conveyance is made fairly and without fraud; if there has been no undue influence; if the vendor was, at the time of its execution, capable of contracting in law, fully understanding its purport and meaning; and if the consideration which he received for it was, under the circumstances, fair, if not fully adequate—such conveyance if properly made is in full compliance with law, and is inoperative only because there was, at the time of its execution, no interest in the vendor to which it could attach. But the right to make contracts for the future conveyance of property to which the vendor has no present title must be conceded; and so, in accordance with its familiar rules, the assignment

[9] Boynton v. Hubbard, 7 Mass. 112.

[10] McClure v. Raben, 133 Ind. 507. And see p. 56, *ante*.

[11] Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382; Baylor v. Commonwealth, 40 Pa. 37; Powers' Appeal, 63 id. 443; Lewis v. Madisons, 1 Munf. (Va.) 303; Parsons v. Ely, 45 Ill. 232; Nesmith v. Dinsmore, 17 N. H. 515; McDonald v. McDonald, 5 Jones, Eq. (N. C.) 211; Mastin v. Marlow, 65 N. C. 695.

[12] See Boynton v. Hubbard, 7 Mass. 112, where Chief Justice Parsons refused to sanction an assignment made by a nephew in the life-time of his uncle of his expectant interest in that uncle's estate. And see Lowry v. Spear, 7 Bush (Ky.), 451.

of a mere expectancy will be given effect in equity, not as a grant,[13] but as a contract, entitling the assignee to a specific performance as soon as the assignor has acquired the power to perform it.[14]

So, too, an heir presumptive may release to his ancestor his expected share in the ancestor's estate and thereby become estopped from asserting any claim in the event of the ancestor's death intestate.[15]

§ 57. **Co-tenants.** Joint tenants, coparceners and tenants in common have long been held to stand in such a relation of trust and confidence towards each other as to preclude them from purchasing an outstanding title or incumbrance for their own exclusive benefit, or from setting up such title as against their co-tenants. The reason for this is said to be that they come within the principle which prohibits a party from purchasing an interest where he has a duty to perform inconsistent with the character of a purchaser; that their community of interest produces a community of duty, and raises mutual obligations to each other. Hence, such a purchase by either will inure to the joint benefit of both, the purchaser, however, being entitled to contribution from his co-tenant for the latter's proportion of the price paid.[16]

Where the estate in co-tenancy is of an inferior character, as for life or lives or a term of years, any of the tenants in common may purchase the superior estate without incurring any obligation to his co-tenants to share in the benefit of the purchase. The rule that one standing in a confidential relation to another cannot be permitted to acquire an interest in property hostile to that of the other does not apply in such a case as the rule is limited by its own terms, when applied to co-tenants, to the acquisition of property in which all of the tenants are interested. Hence, if a tenant in common of a

[13] If a conveyance is made with covenants of warranty it will operate to pass the title by estoppel if the land descends to the heir. Rosenthal v. Mayhugh, 33 Ohio St. 158; Bohn v. Bohn, 78 Ky. 408.

[14] *Re* Garcelon, 104 Cal. 570; Collins appeal, 107 Pa. St. 590; Ridgeway v. Underwood, 67 Ill. 419; Crum v. Sawyer, 132 Ill. 443; Bailey v. Hoppin, 12 R. I. 560. The English cases hold the same doctrine.

[15] *Re* Garcelon, 104 Cal. 570; Brands v. DeWitt, 44 N. J. Eq. 545.

[16] Swinburne v. Swinburne, 28 N. Y. 568; Picot v. Page, 26 Mo. 398; Weaver v. Wible, 25 Pa. St. 270;

leasehold estate should purchase the fee from the landlord it would not inure to the common benefit nor could the others demand same by an offer of contribution. The estate so purchased would not be adverse to the leasehold estate held in common nor would the property acquired by the purchasing tenant be inconsistent with the terms of the lease.[17]

Tenants in common are considered as solely and severally seized, their freehold interests being distinct and with no privity of estate as regards each other.[18] Hence they may convey and dispose of their undivided interests to a stranger, the purchaser simply taking the same position in relation to the co-tenants as was occupied by his grantor.[19]

But one tenant in common cannot convey any specific part of the land so as to prejudice the rights or affect the interests of the other co-tenants;[20] hence a conveyance of part of the common land by metes and bounds would be practically invalid as against the other tenants unless their assent is manifested by some proper act.[21] Such a deed is not wholly void, however; it is operative as against the grantor, and will be effective to convey such land if the other tenants shall afterwards, by release or some other act, assent, or there be a subsequent valid partition by which the land so granted is assigned to the

Titsworth v. Stout, 49 Ill. 78; Brittin v. Handy, 20 Ark. 381; Dray v. Dray, 21 Oreg. 59.

[17] Ramberg v. Wahlstrom, 140 Ill. 182.

[18] Burr v. Mueller, 65 Ill. 258.

[19] Fisher v. Eslaman, 68 Ill. 78; Butler v. Roys, 25 Mich. 53.

[20] Porter v. Hill, 9 Mass. 34; Peabody v. Minot, 24 Pick. (Mass.) 329; Griswold v. Johnson, 5 Conn. 363; Duncan v. Sylvester, 24 Me. 482; Stark v. Barrett, 15 Cal. 368; Mitchell v. Hazen, 4 Conn. 495; Markoe v. Wakeman, 107 Ill. 263; Shepardson v. Rowland, 28 Wis. 108.

[21] Jeffries v. Radcliff, 10 N. H. 242; Whitton v. Whitton, 38 N. H. 133. What shall constitute a sufficient assent by the co-tenants is not well defined, but it has been held that the absence of objection is not proof of dissent. Great Falls Co. v. Worster, 15 N. H. 449; Duncan v. Sylvester, 24 Me. 482. The doctrine that a conveyance of a part of the common property by one tenant is invalid as against the others, is based, in all cases, upon the fact that if sustained it would seriously affect the rights of the other tenants in respect to partition; compelling them to take a share in each of the several parcels of the common property, such as their co-tenant might choose to mark out, instead of a share in the whole. Bartlett v. Harlow, 12 Mass. 347; Duncan v. Sylvester, 24 Me. 482; Griswold v. Johnson, 5 Conn. 363; Smith v. Benson, 9 Vt. 138; and see 4 Kent. Com. § 368.

share of the grantor.[22] Even though a co-tenant may be in the possession of a specific portion of the common tract, he nevertheless holds his undivided interest therein subject to the contingency of the loss of it, if, on partition of the general tract, the special tract should be allotted to one of his co-tenants. Hence, as one tenant cannot appropriate to himself any particular part of the common property, so it follows that any conveyance of the same by him must be subject to the ultimate determination of the rights of the other tenants. The grantee must take, therefore, subject to the contingency of the loss of the premises, if, on partition of the general tract, they should not be allotted to the grantor. Subject to this contingency the conveyance is valid, and passes the interest of the grantor.[23] So also, while such a deed can have no effect on the rights of the co-tenants in respect to partition, it will yet entitle the grantee to stand in the place of his grantor in respect to the possession and profits of that part.[24]

§ 58. **Partners.** Partnership holdings in realty are, in many respects, governed by the same general rules that apply to tenants in common; and for most purposes, as between the partners, this is regarded as the character of their ownership. But as between the partners and third persons, or as between themselves where the rights of third persons are concerned, the relation is strictly one of partnership, and the property is regarded as a partnership effect;[25] that is, as the property of

[22] See Primm v. Walker, 38 Mo. 94; Benedict v. Torrent, 83 Mich. 181; Stark v. Barrett, 15 Cal. 370.

[23] Gates v. Salmon, 35 Cal. 576.

[24] Ballou v. Hale, 47 N. H. 347.

[25] It is by reason of this principle that partnership realty acquires the character of personalty and is governed in many respects by the general rules applicable to that class of property. See Mauck v. Mauck, 54 Ill. 281; Scruggs v. Blair, 44 Miss. 406; Moderwell v. Millison, 21 Pa. St. 257; Arnold v. Wainwright, 6 Minn. 358. But this doctrine, manifestly incongruous, is often pushed too far; and the statement, frequently made, that partnership realty is to be treated the same as personalty is not altogether true. For the purpose of properly adjusting the relations of the partners, either as between themselves or third persons having dealings with them as such partners, it is allowed to assume some of the characteristics of personalty; yet it must be seen that no court can, by an arbitrary rule, transmute real into personal property. So far, therefore, as may be necessary to attain the ends of the partnership it may be treated as personalty, but for every other purpose it remains realty, and is subject to all the principles and

the firm, considered as a legal entity, and not the individual property of each member of the firm. The effect of this is to render them for some purposes joint tenants, with the right of survivorship for all purposes of holding and administering the estate until the obligations of the firm have been discharged. Again, partnership differs materially from a tenancy in common in reference to the power of disposal, as well as from the further fact that none of the partners have any claim to any specific share or interest in the real estate as tenants in common have, but only to the proportion of the residue which shall be found to be due them respectively upon the final balance and adjustment of their accounts, and the liquidation of all claims upon the firm.

There is another principle in relation hereto which probably has received more universal assent, and, as a rule, seems to admit of fewer exceptions, than any other in this branch of the law, and that is: that one partner during the continuance of the partnership has no power to convey the real estate of the firm, either by deed or assignment; nor to make any contracts in relation thereto specifically enforcible against the others; and, unless expressly authorized, deeds so made which profess to transfer the property of the absent partner or incur liabilities in regard to the same are absolutely void as against the partner who did not join.[26]

It is further to be observed that partners in lands have an equity against each other for the purpose of producing equality among themselves. This equity fastens itself to and is a lien upon their respective interests in such lands; and neither partner, nor a purchaser from him with notice, can deprive his copartner of such lien. The lien survives the death of the partner, and may be enforced by his heirs or personal representatives where the inequality between the partners or indebtedness from one to the other arose from transactions accruing in the life-time of such partner.[27]

§ 59. Continued—What shall be considered partnership

laws applicable thereto. See Black v. Black, 15 Ga. 445; Scruggs v. Blair, 44 Miss. 456; Foster's Appeal, 74 Pa. St. 391. Compare Lowe v. Lowe, 13 Bush (Ky.), 688.

[26] Ruffner v. McConnel, 17 Ill. 212; Jackson v. Stanford, 19 Ga. 14; Goddard v. Renner, 57 Ind. 532.

[27] Williams v. Love, 2 Head (Tenn.), 80.

property. It is an old and well-established rule that real property purchased with partnership funds, and used by the firm in its business, becomes impressed with the character of partnership property, and subject to many of its incidents.[28] The fact that the legal title has been taken in the names of the individual members of the firm in no way militates against this rule,[29] nor is it absolutely indispensable that the property should actually be used for partnership purposes, or that there shall have been a positive agreement making it partnership property; for if it has been paid for with partnership effects, it is then a question of intention whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be regarded as partnership property.[30] To solve this question of intention extrinsic evidence of the circumstances attending the purchase, or of any agreement made at the time, may always be resorted to;[31] and the manner in which the accounts are kept, as whether the purchase money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, purchase money, income, expenses, etc., are controlling circumstances, and from these circumstances an agreement may even be inferred.[32]

The question derives its main importance from the priority to be given to creditors, whether of the firm or the individuals composing it, and is essentially one of construction as to the

[28] Hiscock v. Phelps, 49 N. Y. 97; Fall River Co. v. Borden, 10 Cush. (Mass.) 407; Sigourney v. Munn, 7 Conn. 11; Uhler v. Semple, 20 N. J. Eq. 288; Ross v. Henderson, 77 N. C. 170; Price v. Hicks, 14 Fla. 565; Bopp v. Fox, 63 Ill. 540; Ludlow v. Cooper, 4 Ohio St. 1; Hunt v. Benson, 2 Humph. (Tenn.) 459; Bryant v. Hunter, 6 Bush (Ky.), 75.

[29] Page v. Thomas, 43 Ohio St. 38; Callumb v. Read, 24 N. Y. 505; Sherwood v. St. Paul, etc. Co. 21 Minn. 127; Pugh v. Currie, 5 Ala. 446.

[30] Fairchild v. Fairchild, 64 N. Y. 471; Ware v. Owens, 42 Ala. 212; Holmes v. Self, 79 Ky. 297; Providence v. Bullock, 14 R. I. 353; and see King v. Weeks, 70 N. C. 372; Indiana Pottery Co. v. Bates, 14 Ind. 9; Matlack v. James, 13 N. J. Eq. 128; York v. Clemens, 41 Iowa, 95; Dewey v. Dewey, 35 Vt. 555.

[31] A different rule seems to prevail in Pennsylvania, where it has been held that the legal effect of the deed cannot be affected by extrinsic evidence. See Ebert's Appeal, 70 Pa. St. 79; Le Fevre's Appeal, 69 Pa. St. 122.

[32] Fairchild v. Fairchild, 64 N. Y. 471.

intent of the partners in making the purchase. A third person who purchases or takes from one of the partners a mortgage on his individual interest in the land will, if the property be partnership effects, and such purchaser or mortgagee has knowledge of the same, be postponed to the lien of a firm creditor. On the other hand, a purchaser has a right to rely upon the records; and if the purchase is made in good faith and for value, he will not be affected by any equities or even legal rights of which he has no knowledge, and which such records fail to disclose.[33] But while a purchaser or mortgagee without notice, finding the legal title in the names of the individual partners, will be protected as a *bona fide* purchaser, a judgment creditor, it seems, can make no such claim. His lien will extend only to the beneficial interest of the defendant partner, and this interest consists only of the residuary share of such partner after the partnership accounts are settled and the rights of parties *inter sese* adjusted.[34]

§ 60. Continued—How affected by death of partner. The death of one of the partners operates as a dissolution of the firm, and the share or interest of such deceased partner in the partnership real estate descends to his heirs or passes to his devisees as in other cases of common tenancy.[35] But, as partnership realty possesses many of the features of personalty, and, together with other assets, is regarded as a trust fund for the payment of the debts of the firm, the legal title which descends to the heirs or passes to the devisees is impressed with the same trust. The surviving partner is clothed with the power of executing this trust, and to that end is permitted to manage and control such property. If necessary, he may sell it and convey to the purchaser not only the legal title

[33] Page v. Thomas, 43 Ohio St. 38; Lovejoy v. Bowers, 11 N. H. 404.

[34] Page v. Thomas, 43 Ohio St. 38; York v. Clemens, 41 Iowa, 95; Scruggs v. Blair, 44 Miss. 409; Willis v. Freeman, 35 Vt. 44; Blake v. Nutter, 19 Me. 16; Duhring v. Duhring, 20 Mo. 174; Russell v. Miller, 26 Mich. 1; Mauck v. Mauck, 54 Ill. 281; Fowler v. Bailley, 14 Wis. 125; Jarvis v. Brooks, 27 N. H. 37; Lang v. Waring, 38 Ala. 625; Davis v. Christian, 15 Gratt. (Va.) 11; Price v. Hicks, 14 Fla. 565; Ross v. Henderson, 77 N. C. 170; Little v. Snedecor, 52 Ala. 167; Dupuy v. Leavenworth, 17 Cal. 262; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339.

[35] The English rule is to the contrary, and partnership realty always retains the character and qualities of personalty.

vested in himself, but also the equitable estate which he holds as such surviving partner; and if such sale is made in good faith and fairness, equity will compel the holders of the outstanding legal title to convey the same to said purchaser, and thus complete the ownership.[36]

It was formerly a vexed question whether, after the dissolution of the firm by the death of one of the members, the debts being all settled and no purpose of the firm requiring it, the share of the deceased partner in the land should still retain its character of personalty and pass to his personal representatives, or should descend as real property to his heirs at law. The principles which govern this branch of the law as administered by the English courts of equity would seem to regard a deceased partner's interest as personalty for all purposes,[37] and many of the earlier American cases hold the same doctrine; but the current of modern decisions has steadily tended in the other direction, and the rule as stated in

[36] Holland v. Fuller, 13 Ind. 195; Buffum v. Buffum, 49 Me. 108; Dupuy v. Leavenworth, 17 Cal. 262; Fowler v. Baily, 14 Wis. 129; Little v. Snedecor, 52 Ala. 167; Hewitt v. Rankin, 41 Iowa, 35; Drewry v. Montgomery, 28 Ark. 256; Willett v. Brown, 65 Mo. 138; Whitney v. Catten, 53 Miss. 689; Ludlow v. Cooper, 4 Ohio St. 9; Shanks v. Kleine, 104 U. S. 18.

[37] This is one of the artificial refinements adopted by the chancellors in England for the purpose of giving effect to the agreement of the partners, and is said to have originated in this wise: by the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactment, the writ of *elegit*, and statutes merchant and staple, subjected land to the claim of creditors in a modified way; that is, by giving the creditor a right to have the land extended at a yearly value, and to have an estate therein, and receive the rents and profits thereof, until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purposes of trade and become the means of extended credit as fully as if it could be sold outright like personal property. Again, land held in joint tenancy was subject to the doctrine of survivorship, by which, on the death of either tenant, the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained an agreement that the land required and owned as part of the stock in trade should be considered and treated as personalty, and in others the acts of the parties furnished ground for the inference that it was the intention to impress on land the

the opening of this paragraph may now be considered as fully settled. The rules of law which gave rise to the doctrine in England, and were the foundation upon which it was built, have little or no application in this country. Land may be seized and sold on execution and the doctrine of survivorship is practically abolished. The reason of the rule having ceased, therefore, courts seem ever-more inclined to the opinion that the rule itself is no longer applicable.

§ 61. **Real estate partnership.** The subjects discussed in the foregoing paragraphs have reference mainly to conditions created by an ordinary commercial partnership and the relations sustained by the parties thereto where lands have been incidentally or casually acquired during the course of the partnership business. But not infrequently partnerships are formed for the express purpose of dealing in lands and the buying and selling of such lands constitutes the only business of the firm. The general principles which govern the partnership relation do not seem to be materially different in cases of this kind from those which apply to the ordinary trading or commercial partnership.[38]

§ 62. **Widow's dower in partnership realty.** As the heirs take the legal title, so also is the widow of a deceased partner entitled to dower in lands which constitute a portion of the partnership assets; but as to her, the same as to the heirs, the property is regarded as personalty for the purpose of paying debts and adjusting equities between the partners, and her rights will only attach to her deceased husband's share after the payment of such debts and adjustment of equities.[39] Courts have even held that it is unnecessary for the wives of partners to join with them in the execution of deeds or mortgages of the partnership realty, since the dower right did not

character of personalty in all such cases; and the courts inclined to extend them by construction and implication. It was held in equity that the agreement and intention of the parties should be carried into effect, and to do so the land must be considered and treated as personalty.

[38] See Thompson v. Bowman, 6 Wall. (U. S.) 316; Chester v. Dickerson, 54 N. Y. 1; Ludlow v. Cooper, 4 Ohio St. 1; Rovelsky v. Brown, 92 Ala. 83.

[39] Huston v. Neil, 41 Ind. 505; Killet v. Brown, 65 Mo. 138; Cobble v. Tomlinson, 50 Ind. 550; Barry v. Briggs, 22 Mich. 201.

attach to specific property, but only to whatever residuum might be left after final accounting.[40]

§ 63. **Syndicates—Joint stock companies.** In the preceding paragraphs we have considered partnerships of the ordinary character where each partner is the agent of his firm and has personal contact with and control over its affairs and a vested right of possession, in common with his copartners, in the property of the firm. But of late years there has sprung up a new species of joint adventure in the purchase and sale of lands as a marketable commodity, variously known as "syndicates," "land associations," etc. These associations are voluntary in character and in practice more nearly resemble what are known as joint stock companies than any other form of business relation. In some states, where the formation of such companies is expressly permitted, they are so conducted. The effect of such association both as between the adventurers and those with whom they may sustain business relations has frequently occasioned much discussion. As a general proposition such associations may be classed as partnerships and to them many of the general rules of partnership are fully applicable.[41]

The articles of association will, of course, go far to determine the character which the members sustain both toward each other and to the public, but where, as is generally the case, the capital is contributed on the basis of a specific sum for each share in the enterprise, the lands purchased being held and managed for the joint account by a trustee, and the interest of members or shareholders is limited to a participation in whatever profits may be realized on the company's ventures, the shares are simply personal property. As a rule the holders of such shares possess no estate in or title to the land purchased by the trustee, as tenants in common or otherwise, and they can neither convey nor incumber it. In case of the death of a shareholder, his shares will go to his personal representatives, and their interest as such shareholders will be exactly the same as his was while living. His widow will take no dower or other rights in the lands, and the business of the company will not be appreciably affected. So, too, a

[40] Huston v. Neil, 41 Ind. 505. Spencer v. Jones, 92 Tex. 516.

[41] Jones v. Davies, 60 Kan. 309;

shareholder may sell and transfer his holdings without consultation with his associates and without impairing the power of the trustee or the existence of the company.[42]

On the other hand, if the purchase is made with a view of specific division of the land among the shareholders, then they become tenants in common and they stand toward the trustee in the relation of *cestui que trusts.* In such event the usual incidents follow their equitable ownership.

§ 64. **Corporations.** Among the original powers inseparably incident to every corporation was that of purchasing lands and of holding them for the benefit of themselves and their successors.[43] But this common-law right was restrained in England at a very early day by a series of laws called "statutes of mortmain." These laws, it is said, were designed to repress the grasping and rapacious spirit of the church, which was absorbing in perpetuity the best lands in the kingdom. They were called statutes of mortmain because their object was to prevent the holding of lands in the dead hand of ecclesiastical corporations, which, being composed of members dead in law,[44] rendered the property unproductive to the feudal lord as well as to the public.[45] This system of restraint, though originally confined to religious corporations, was subsequently extended to civil or lay corporations as well.

The English statutes of mortmain have never been re-enacted in this country,[46] though in some states they have been held to have effect so far as the changed conditions of our political system would allow; yet their policy has been retained, and is manifest in the general and special enactments of every state. The right of corporations to acquire and transmit property is now generally regarded as a statutory one in the state of their creation,[47] and in other states is based only upon the comity between the states.[48] In the latter case it is a voluntary act

[42] *Re* Oliver's Estate, 136 Pa. St. 43; Jones v. Davies, 60 Kan. 309; Spencer v. Jones, 92 Tex. 516.

[43] 1 Black. Com. 475; 2 Kent, Com. 281.

[44] Entering a monastery or religious community was one form of civil death.

[45] 1 Black. Com. 479; Co. Lit. 2 b; Ang. & Ames, Corp. § 148.

[46] Except by the state of Pennsylvania.

[47] State v. Marshfield, 23 N. J. L. 510; Downing v. Marshall, 23 N. Y. 366.

[48] Carroll v. East St. Louis, 67

of grace of the sovereign power,[49] and is inadmissible when contrary to its policy or prejudicial to its interests.[50]

§ 65. **Municipalities.** A municipal corporation, while it may not acquire title to lands for speculative purchases, has a right to purchase and hold such as it may need for the legitimate uses of the people, and when such lands are no longer required may sell and dispose of same in much the same manner as a private proprietor. Very frequently a municipal corporation in acquiring lands obtains only a usufructuary right therein under the power of eminent domain or through an act of dedication. This is very generally the case where the land is used for the convenience of public travel or recreation. While the land is so used no power of sale can be exercised, and in case of diversion, abandonment or vacation the possession reverts to the owner of the fee. It would seem, however, that if the municipality possesses an absolute title to its streets, parks, etc., with power to vacate them, it may, upon regular vacation had and a payment or tender of fair damages, if any, to abuttors or owners, grant or sell the land thus vacated to private parties.[51]

§ 66. **Assignees.** When a contract of sale has been assigned, the vendor not being a party to the assignment, no duty devolves on the vendor to hunt up the assignee to tender a deed: it is sufficient if he tenders it to the original vendee; and it is the duty of the assignee to make a tender of the money and demand a deed at or within the time designated in the contract, if time is of the essence of the agreement, or within a reasonable period if time is not material; and if the assignee fails to do so the vendor may treat the contract as abandoned, and equity cannot be invoked by the assignee to enforce a specific performance.[52]

It is further to be observed that the assignee of a bond or agreement for conveyance, being only the purchaser of an equity, will take such title burdened with all its imperfections

Ill. 568; St. Clara Academy v. Sullivan, 116 Ill. 375.

[49] Ducat v. Chicago, 48 Ill. 172; State v. Fosdick, 21 La. Ann. 434.

[50] Carroll v. East St. Louis, 67 Ill. 568.

[51] See Lindsay v. Omaha, 30 Neb. 512; Dempsey v. Burlington, 66 Iowa 688.

[52] Hedenberg v. Jones, 73 Ill. 149.

and subject to any equities or defenses that may exist against it; and this, too, notwithstanding he has purchased in good faith, for a valuable consideration, and without notice thereof.[53] A subsequent purchaser, it is true, will be protected against latent equities, but this protection extends only to those who by conveyance have been clothed with the legal title. The rule, stated in a more comprehensive form, is that, as between parties holding equal equities, courts will not interfere to change or affect the legal title or the rights of the parties at law, simply because nothing is gained in equity thereby, the one having as good right in equity as the other. In all cases where neither party has the legal title, and the equities are equal, the well-known maxim prevails that he who is first in time is first in right.[54]

A deed, that is an instrument under seal, is not essential to the transfer of a purchaser's interest in a contract for the sale of land, for while a vendee's interest is, for many purposes, regarded as real property, yet such interest is purely equitable and will pass by simple assignment.[55]

It is customary to draw contracts of purchase with a special inclusion of the heirs, executors, administrators and assigns of the respective parties. An assignee of such a contract, however, is not personally liable for the unpaid purchase price. The land in his hands may be charged with a vendor's lien and same may be sold in satisfaction of such lien, but no compulsory payment can be exacted from him nor will a judgment for deficiency lie in case the vendor's lien is foreclosed. In the absence of any express agreement on the part of the assignee the stipulations of the contract of sale with respect to purchase money must be regarded as a personal covenant of the original vendee.[56]

§ 67. **Assignors.** While the assignee of a bond or agreement to convey takes it subject to any equities that may exist against the assignor, yet, if the assignment is absolute and unconditional and made upon a valuable consideration, the assignor, where there is no stipulation to that effect, under-

[53] Smith v. Tucker, 25 Tex. 60; Follett v. Reese, 20 Ohio 546.

[54] Anketel v. Converse, 17 Ohio St. 11; Elstner v. Fife, 32 Ohio St. 373.

[55] Fruhauf v. Bendheim, 127 N. Y. 587.

[56] Lisenby v. Newton, 120 Cal. 571.

takes by implication that he is the owner of the instrument, and has an indefeasible right to demand what the bond or agreement calls for. If he has not such right, there is a breach of this implied undertaking the moment the assignment is made; and it is not necessary to fix his liability that this want of right in the assignor should be established by suit. And it seems that though the assignee receives it with notice or knowledge of the adverse claims of other parties, if he did not agree to risk the claims of such third persons, he may still recover against his assignor; the undertaking created by the assignment being sufficiently comprehensive to impose a responsibility against such claims in the absence of an express waiver.[57]

But this is the full extent of the assignor's liability. There is no implied covenant, on his part, of title to the land in the vendor; all that can be implied is a warranty that the assignor owned the contract, and had the right to assign it, and that the signatures thereto are genuine.[58]

§ 68. Death of contracting party—Executors and administrators. It is a well established presumption of law that where a party makes a contract he intends to bind his personal representatives—executors and administrators—unless the contract is one which calls for some personal act or quality of the contractor. This presumption applies with much force to contracts for the purchase of land and the personal representatives of the contractor will usually be required to complete his contract in the event of his prior death. It is immaterial whether such representatives are named or referred to in the contract, for they are but a continuation of the deceased for the purposes of the final adjustment of his affairs, and his contracts are generally enforcible against them to the extent of the assets which may come to their hands.[59]

[57] Emerson v. Claywell, 14 B. Mon. (Ky.) 18.

[58] Thomas v. Barton, 48 N. Y. 193.

[59] Chamberlain v. Dunlop, 126 N. Y. 45; Smith v. Wilmington, etc. Co., 83 Ill. 498; McClure v. Gamble, 27 Pa. St. 288.

Article II. Persons Under Disability.

§ 69. Aliens.
70. Infants.
§ 71. Married women.
72. Husband and wife.

§ 69. Aliens. By the law of nations, a contract between a citizen and an alien enemy is void and incapable of legal enforcement.[1] This is the universally recognized rule, and proceeds from the principle that it is impolitic and dangerous to permit an enemy to recover or obtain from a citizen money or other property which may tend to diminish the resources of the country for defense, or perhaps be used in hostility to it. But further than this it is impossible, owing to the divergent character of local laws, to formulate any rule in regard to aliens that shall be of general application in all parts of the Union. There are few topics which have been subjected to more legislative tinkering and laws relating thereto are constantly being changed.

It was formerly held to be against public policy to allow any person owing no allegiance to the government to own lands within its jurisdiction; and this doctrine still prevails, though modified somewhat in its harshness, in a number of the states. The rule grew out of the narrow insular policy of early English law,[2] but the tendency now is in the contrary direction, and the enlightened policy of the age has been to remove all restrictions from the transfer of land. In a majority of the states aliens may take, hold, transmit and convey in the same manner as a citizen;[3] in a few the privi-

[1] Brooke v. Filer, 35 Ind. 402; Fisher v. Kurtz, 9 Kan. 501; Clements v. Graham, 24 La. Ann. 446; McCormick v. Arnspiper, 38 Tex. 569; Hill v. Baker, 32 Iowa, 302. The fact that the agent selling the property was within the section to which the vendee belonged has been held not to vary or alter the rule. Dillon v. United States, 5 Ct. of Cl. 586. But while the volume of authority holds that conveyances of land to alien enemies are void, there are cases which hold that the rule of non-intercourse, as between belligerents, has no application to the conveyance of real property situated in one belligerent territory by a citizen of another. Shaw v. Carlile, 9 Heisk. (Tenn.) 594; Conrad v. Waples, 96 U. S. 290.

[2] Since abolished in England.

[3] This is the case in Alabama, Colorado, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Min-

lege is confined specifically to alien friends;[4] in others to aliens actually resident in the state,[5] or the United States,[6] and in some cases is only extended to resident aliens who have declared their intention of becoming citizens.[7] Again, other states, while conceding the privilege of the acquisition by purchase, deny the right of inheritance,[8] or, if this is permitted, compel the alien to make his claim of property within a limited time,[9] or limit the period during which he is allowed to hold it.[10] In a few states the amount and value is limited,[11] and in one an alien is practically debarred.[12]

The rule of the common law permits an alien to take land by purchase,[13] either deed or devise,[14] and to hold it against all persons but the state;[15] and, as the disabilities of the alien rest upon the fact of alienage and not upon his character, there is practically no distinction in this respect between an alien friend and an alien enemy.[16] The title held by him is not subject to collateral attack,[17] and may be sold and conveyed before any action has been taken by the state, and the purchaser will hold the same in all respects as though the conveyance had been made by a citizen.[18] It is a further rule, however, that an alien can acquire no title by operation of law. Having no inheritable blood he is incapable of taking by descent;[19] and where he stands in such a position that he

nesota, Mississippi, Missouri, Nebraska, North Carolina, Ohio, Oregon, Rhode Island and Wisconsin.

[4] This is so of New York and Virginia.

[5] As in Arkansas, Michigan and New Hampshire.

[6] Connecticut.

[7] Delaware, Kentucky and New York.

[8] As in Kentucky.

[9] California requires proof in five years.

[10] As in Indiana, where he is allowed only eight years after final settlement of the estate; and in Illinois, where he is restricted to six years.

[11] Georgia, Pennsylvania and Wisconsin.

[12] Vermont.

[13] Doe v. Robertson, 11 Wheat. (U. S.) 332; Montgomery v. Dorion, 7 N. H. 475; Smith v. Zaner, 4 Ala. 99; Sheaffle v. O'Neil, 1 Mass. 256.

[14] Fox v. Sauthack, 12 Mass. 143; Guyer v. Smith, 22 Md. 239.

[15] Ramires v. Kent, 2 Cal. 558; Phillips v. Moore, 10 Otto (U. S.), 208; Scanlan v. Wright, 13 Pick. (Mass.) 523.

[16] Read v. Read, 5 Call (Va.), 207; Stephens' Heirs v. Swann, 9 Leigh (Tenn.), 404.

[17] Norris v. Hoyt, 18 Cal. 217.

[18] Halstead v. Commissioners, 56 Ind. 363; Montgomery v. Dorion, 7 N. H. 475.

[19] Mussey v. Pierie, 24 Me. 559;

would take as heir but for his alienage, the title vests in the next of kin capable of inheriting, or escheats to the state.[20]

But these rules now possess little efficacy, and are statements of the law as it was rather than as it is. A clearer perception of the rights of property now prevails, and a more enlightened spirit of public policy has swept away the greater portion of the arbitrary and ofttimes unjust discriminations and restrictions that formerly hampered the acquisition and sale of landed estates. In most of the states an alien is not distinguished from a citizen, so far as respects his rights of property and his ability to make and enforce contracts in regard to the same; and, generally, for the procurement of his rights or the redress of his wrongs he stands on the same ground as the citizen, equal before the law. That such should be the law seems only in consonance with modern ideas of justice, and that such is the law is attested by the statute books of many states; yet, within a very few years, a reactionary spirit seems to have set in, induced by the aggressive attitude of numerous wealthy foreigners, who, by purchasing and retaining large tracts of land in the western states and territories, have endeavored to plant in the United States the system of landed estates that has become so odious in many parts of Europe. The principle of "landlordism," as understood by the people of Great Britain, is certainly not in accord with the genius and spirit of our institutions, and its blighting effects upon the peasantry of the old world are only too apparent even at this distance. That some of the states, alarmed at the concentration of thousands of their broad acres in the ownership of the subjects of a foreign power, and viewing with apprehension the reduction of its own citizens to the grade of tenants of a foreign landlord, should have taken steps to check the evil, is not strange; and hence we occasionally find tolerant states, which for years have removed every bar to the acquisition of its lands, passing stringent laws to restrict the purchase of land by aliens.[21]

§ 70. **Infants.** The age of legal competency has been gen-

Orr v. Hodgson, 4 Wheat. (U. S.) 453.

[20] Jackson v. Jackson, 7 Johns. (N. Y.) 214; White v. White, 2 Met. (Ky.) 185.

[21] The federal constitution nowhere defines citizenship, but the fourteenth amendment provides that "all persons born or naturalized in the United States, and sub-

erally fixed by the statute at twenty-one years;[22] and, except under certain limitations, persons who have not attained this age are incapable in law of making binding contracts. By the technical rules of the common law in cases of executory contracts the infant may, in general, not only refuse to perform them during his infancy, but may disaffirm them after he comes of age, leaving the other party without a remedy; and even when the contract has been executed, the right of disaffirmance may still be exercised either during minority or within a certain period after attaining majority. These are the universally recognized rules in regard to contracts generally; and under them a contract by a minor for the purchase or sale of land cannot be enforced against him, if he sees fit to repudiate it after attaining his majority. That the contract has been executed does not materially alter the *status* of the parties; for the same reasons that permit the infant to repudiate his executory contracts allow him to disaffirm such as have been executed, and no conveyance made by him during his minority will be binding upon him after he arrives at age.[23] During the interval between the execution of the instrument and the attainment of majority, the contract or conveyance can neither be said to be void or valid; nor can any act of his impart to it either character. It is simply voidable, and so remains until he shall decide the question for himself after he becomes of age.[24]

The rule appears to be inflexible; and it makes no differ-

ject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Congress has also furnished a definition in section 1992 of the Revised Statutes, which says, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

[22] A departure from this rule is observed in many states in the case of females, who are permitted to attain majority at the age of eighteen years; but within this age there is no difference in the application of the accepted principles governing the *status* of infancy.

[23] Harrod v. Meyers, 21 Ark. 592; Cummings v. Powell, 8 Tex. 80; Green v. Green, 69 N. Y. 553; Boston Bank v. Chamberlin, 15 Mass. 220; Kline v. Beebe, 6 Conn. 494; Dearborn v. Eastman, 4 N. H. 441; Jenkins v. Jenkins, 12 Iowa, 195; Chapman v. Chapman, 13 Ind. 396; Fergusen v. Fergusen, 17 Mo. 347; Walker v. Ellis, 12 Ill. 470; Dolph v. Hand, 156 Pa. St. 91; Logan v. Gardner, 136 Pa. St. 588; Manning v. Johnson, 26 Ala. 446.

[24] Dunton v. Brown, 31 Mich. 182; Keil v. Healy, 84 Ill. 104.

ence that the contract was honestly entered into by the adult party supposing the infant to be of full age and competent to contract, nor that his belief was created by the fraudulent representations of the infant, at the time the contract was made, that he had attained his majority. Such representations would not create an estoppel, and the infant would, notwithstanding, still be able to disaffirm on becoming of age.[25] The deed of an infant, however, is by no means inoperative, and will suffice to transmit title with all its incidents.[26] It he takes no steps to avoid it during the period allowed by law the title becomes unassailable for this cause; and while mere acquiescence during this period cannot be construed into a confirmation,[27] there are many cases where this, in connection with other circumstances, have been held to establish a ratification.[28] Where no specific time is fixed by statute—and this is the case in most of the states—it has, in a number of instances, been held that silent acquiescence, unaccompanied by other circumstances, for any period shorter than that prescribed by the statute of limitations, would be insufficient to bar the right of disaffirmance;[29] but, on the other hand, a large and well-considered class of cases maintain that, if the

[25] Merriam v. Cunningham, 11 Cush. (Mass.) 40; Studwell v. Baker, 54 N. Y. 249; Conrad v. Lane, 26 Minn. 389; Gilson v. Spear, 38 Vt. 311; Lackman v. Wood, 25 Cal. 147; Cook v. Toombs, 36 Miss. 685; Wieland v. Kobick, 110 Ill. 16. In this latter case the infant stated in her deed that she was "unmarried and of age," and indeed only lacked a few months of majority; but the defense of infancy was held good. Compare Kilgore v. Jordan, 17 Tex. 341. Nor is there any difference in this respect between a conveyance and a relinquishment of dower. Watson v. Billings, 38 Ark. 278.

[26] Irvine v. Irvine, 9 Wall. (U. S.) 617; Worcester v. Eaton, 13 Mass. 371; Logan v. Gardner, 136 Pa. St. 588.

[27] Boody v. McKenny, 23 Me. 517; Prout v. Wiley, 28 Mich. 164; Vaughn v. Parr, 20 Ark. 600; Baker v. Kennell, 54 Mo. 82.

[28] See Hartman v. Kendall, 4 Ind. 405; Cresinger v. Lessee of Welch, 15 Ohio, 193; Fergusen v. Ball, 17 Mo. 374; Bostwick v. Atkins, 3 N. Y. 53. As where the infant, after his majority, has seen the purchaser making valuable improvements and said nothing in disaffirmance. Wheaton v. East, 5 Yerg. (Tenn.) 41. Or where, after becoming of age, he receives from his grantee a lease of part of the land. Irvine v. Irvine, 9 Wall. (U. S.) 617.

[29] Peterson v. Laik, 24 Mo. 541; Davis v. Dudley, 70 Mo. 236; Hale v. Gerrish, 8 N. H. 374; McMurry v. McMurry, 66 N. Y. 175; Irvine v. Irvine, 9 Wall. (U. S.) 617.

infant intends to avoid or disaffirm, he must make his election within a reasonable time after the removal of his disability.[30]

Public policy, no less than the spirit of justice between the parties, imperatively requires that one who thus possesses a right of election shall exercise it within a reasonable time or treat the right as waived, and where such person, with full knowledge of his privilege, omits or neglects to assert it, his omission may fairly be regarded as the equivalent of an act of affirmance and as amounting in fact and in law to a ratification.[31] So, too, it is a general rule that any person holding an equitable right must assert same within a reasonable time if he would avail himself of it, and where one who is entitled to such right permits the holder of the legal title to perform acts with respect to the property which he would not have done had the right been promptly asserted, this will constitute such laches as may preclude the negligent party from relief.[32] The rule applies with equal force whether the infant be regarded as a vendor or vendee, and while specific performance will not usually be enforced against one out of possession, yet, if after coming of age he has entered or continues to hold and enjoy the property or has received benefits therefrom, it will amount to confirmation on his part, and he will not be permitted to avoid the sale and refuse payment or reclaim the consideration already paid.[33]

[30] Thompson v. Boyd, 13 Ala. 419; Kline v. Beebe, 6 Conn. 494; Hastings v. Dollarhide, 24 Cal. 195; Richardson v. Boright, 9 Vt. 368; Hartman v. Kendall, 4 Ind. 403; Harris v. Cannon, 6 Ga. 382; Amey v. Cockey, 73 Md. 298; Searcy v. Hunter, 81 Tex. 644. In Blankenship v. Stout, 25 Ill. 132, three years was held to be a reasonable time in which to disaffirm, and the rule has since been followed in that state. In Goodnow v. Empire Lumber Co. 31 Minn. 468, an unexplained delay of three and one-half years after the ceasing of disability was held fatal to a disaffirmance. In Green v. Wilding, 59 Iowa, 679, three years and eight months was held to be an unreasonable delay. What is a reasonable time, however, will, in most instances, depend upon the circumstances of the particular case.

[31] Dolph v. Hand, 156 Pa. St. 91.

[32] As where the holder of the legal title expends money in the improvement of the property, thereby greatly enhancing its value, see Gibson v. Herriott, 55 Ark. 85; Cox v. Montgomery, 36 Ill. 398.

[33] Robbins v. Eaton, 10 N. H. 561; Boyd v. McKenny, 23 Me. 517; Delano v. Blake, 11 Wend. (N. Y.) 85; Callis v. Day, 38 Wis. 643; Skinner v. Maxwell, 66 N. C. 45; Corey v. Burton, 32 Mich. 31; Barnaby v. Barnaby, 1 Pick. (Mass.)

It must further be observed that the privilege of infancy is not in all respects personal to the infant; and contracts, grants or deeds by a matter in writing, and which take effect by delivery of his hand, are voidable not only by himself during his life-time, but also by his heirs, or those who have his estate, after his decease; and his heirs may exercise the same rights of disaffirmance within the same time that the infant himself might if living.[34]

§ 71. **Married women.** It was among the earliest formulated rules of the common law that the legal existence of a woman upon her marriage became suspended, and thenceforward during the coverture was merged entirely in that of the husband. As a consequence she was without capacity to take or hold real property or to make any valid contracts in respect to the same, and all her property became vested in the husband. Equity early intervened to mitigate the austerity of this rule, and the progressive spirit of the law itself did much to relax it, until finally legislation, reflecting the enlightenment of the age, abolished it altogether. The prevailing doctrine now is that coverture forms no bar—a married woman having the same freedom of action and contractual liability as though she were sole.

The original rule, in all its harshness, prevailed for many years in all of the older states, although from an early day a married woman was permitted to convey her lands by joining with her husband in a deed therefor, properly acknowledged and certified; but her acknowledgment, which performed the same office as the ancient fine and recovery, was the operative act to pass the title, and not the delivery of the deed. Under these laws her contracts, whether made separately or jointly with her husband, could not be enforced against her, even though she had received the full value of the land. Later she was permitted, by joining with her husband, to conclude herself the same as a *femme sole*; and under these laws the acknowledgment ceased to be the effective means to work the transfer of title, the certificate standing upon the same footing

221; Biglow v. Kinney, 3 Vt. 353; and see the chapters on "Rescission" and "Specific Performance."

[34] Ill. Land and Loan Co. v. Bonner, 75 Ill. 315; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 248; Austin v. Charleston Seminary, 8 Met. (Mass.) 203; but compare

with that required in respect of an unmarried woman, while the contracts so made were capable of specific enforcement in equity. In still more recent years have come other changes which secure to married women the same rights in regard to their separate estates as is possessed by their husbands in respect to their own property, and for nearly every practical purpose a married woman can no longer be said to rest under a disability from that fact alone.

Such, at least, is the present condition of the law in a majority of the states. But where the statute still prescribes requisites, the rule is that the deed of a married woman, to be operative as a valid legal contract or conveyance, must be executed in strict conformity with all such requirements; and, unless it does so conform, equity cannot supply the defects or omissions.

At common law a wife could convey her lands only by uniting with her husband in levying a fine, which, being a solemn proceeding of record, the judges were supposed to watch over and protect her rights, and ascertain by a private examination that her participation was voluntary. The statute in the United States provided a mode for the alienation of the property of a married woman consisting of certain matters of execution which were regarded as a substitute for the common-law fine, but in order that her deed should be operative to any extent the courts have uniformly held that it must conform fully with the statute.[35]

§ 72. **Husband and wife.** By the rules of the common law neither husband nor wife could contract with or convey property directly from one to the other, the theory being that because of their legal unity neither could grant an estate to the other to take effect in possession during the lifetime of the grantor. The power of the husband to take or dispose of property was not affected by the marriage except in the single instance of conveyance to the wife, but with respect to the wife the policy was always one of repression. The statute

Jackson v. Burchin, 14 Johns. (N. Y.) 127; Beeler v. Bullitt, 3 A. K. Marsh. (Ky.) 280.

[35] See Silliman v. Cummins, 13 Ohio, 116; O'Ferrall v. Simplot, 4 Iowa, 381; Grove v. Zumbro, 14 Gratt. (Va.) 501; Dewey v. Campau, 4 Mich. 565; Pratt v. Battels, 28 Vt. 685.

finally came to her relief and permitted her to convey her separate property on the condition that the husband joined with her in the deed, and so the law stood for many years, and so, to some extent, it still remains. The object of the statute, it would seem, was to afford her his protection against imposition and fraud and to aid her by his counsel and advice.[36] But this statute, while it left her free to convey to another person, did not remove the ban of the common law which prohibited a direct conveyance to the husband, and, notwithstanding that conveyances from the husband to the wife were freely sustained in many instances, the rule with respect to the wife remained. In support of this position it was contended that the law having provided for the joinder of the husband in this class of conveyances, with a view of giving the wife the benefit of his protecting care and advice, it would be illogical to permit him at the same time to act in a capacity, which, in law at least, was adverse to her interests. And so it was generally held that the wife could not make a conveyance to her husband or enter into contractual relations with him respecting her own lands.[37]

But in many of the states the conditions just considered no longer exist. Broad and comprehensive statutes have been enacted which assure to married women the same rights of

[36] Meagher v. Thompson, 49 Cal. 190.

[37] The general result of the reasoning of the cases may be summarized as follows: (1) These statutes are for the benefit of married women, and not for that of their husbands; and any construction which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the very object of the law. (2) The inhibition of the common law, as applied to the husband, was that he could neither convey to his wife, directly, nor be a grantee from her; and, while the right of the wife to take by gift removes the impediment to a voluntary conveyance from the husband to her, yet the right to receive such voluntary conveyance from the wife has not been conferred upon the husband, and he stands, as at common law, incapacitated from taking by deed of gift directly from his wife. (3) The "power to convey and devise real and personal property as if she was unmarried" does not enlarge the powers of the grantees under conveyances by her, and she could not devise to a corporation or person incapable of taking by will, or convey to one incompetent to be a grantee. (4) To render a conveyance from the wife to her husband valid, the husband's common-law disability, as well as that of the wife, must be removed. White v. Wager, 25 N. Y. 328; Brooks v. Kearns, 86 Ill. 547; Scar-

alienation of their separate property as are enjoyed by unmarried women, and where such laws prevail it would seem that a married woman may now convey in the same manner and with the same effect as if sole, subject, of course, to whatever provision the laws of the locality may impose with respect to homestead and dower. In her dealings with third persons but little question can arise under these statutes, and though some doubt may still remain with respect to transactions directly with the husband[38] the trend of opinion indicates that her deeds to him are to be upheld and accorded the same effect as those made to others.[39] And even in those states where deeds of this character are denied effect at law they may still be upheld in equity,[40] particularly when shown to have been based upon a sufficient consideration,[41] and executed without compulsion.[42]

borough v. Watkins, 9 B. Mon. (Ky.) 545; Kinnaman v. Pyle, 44 Ind. 275; Winans v. Peebles, 32 N. Y. 423; Sims v. Rickets, 35 Ind. 181.

[38] See Winans v. Peebles, 32 N. Y. 423; Luntz v. Greve, 102 Ind. 173; Gebb v. Rose, 40 Md. 387.

[39] See Osborne v. Cooper, 113 Ala. 405; Simms v. Hervey, 19 Iowa, 287; Robertson v. Robertson, 25 Iowa, 350; Allen v. Hooper, 50 Me. 371; Burdeno v. Amperse, 14 Mich. 97; Williams v. Harris, 4 S. Dak. 22; Grain v. Shipman, 45 Conn. 572.

[40] Turner v. Shaw, 96 Mo. 22; Darlington's Appeal, 86 Pa. St. 512.

[41] Winans v. Peebles, 32 N. Y. 423, and see Wormley v. Wormley, 98 Ill. 544; Bush v. Henry, 85 Ala. 605.

[42] Darlington's Appeal, 86 Pa. St. 512.

Article III. Persons Incompetent.

§ 73. Lunatics.
74. Imbeciles.
§ 75. Drunkards.
76. Convicts.

§ 73. **Lunatics.** Persons of unsound mind, when such unsoundness amounts to an incapacity to understand and act in the ordinary affairs of life, have always been held incapable of making a valid contract; for it is essential that there should be the concurring assent of two minds, and they who have no mind are unable to give true consent.[1] Yet, while this is the recognized doctrine, it by no means furnishes a conclusive rule for the decision of all questions growing out of the contracts of demented persons; nor indeed can any definite rule, that can be deemed authoritative, be formulated from the reported cases. It would seem, however, that while the plea of lunacy is usually an effectual bar to the enforcement of an executory contract,[2] yet where a purchase has been made from an insane person, and a deed of conveyance obtained in perfect good faith, before an inquisition and finding of lunacy and with no knowledge of such lunacy on the part of the purchaser, and if the transaction has been in all other respects fair and reasonable, with no advantage taken by the purchaser, and if the conveyance was for a sufficient consideration, which was received by the lunatic, then, if the parties cannot be put *in statu quo,* it will not be set aside.[3] This results, it is said, not because the contract was valid and binding, but rather for the reason that an innocent party, without fault

[1] Powell v. Powell, 18 Kan. 371; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 82 U. S. 9; and see Grant v. Thompson, 4 Conn. 203; Lang v. Whidden, 2 N. H. 435.

[2] It was held in Allen v. Berryhill, 27 Iowa, 534, that where a contract made by an insane person has been adopted, and is sought to be enforced by the representatives of such person, it is no defense to the same party to show that the other party was *non compos mentis* at the time the contract was made.

[3] Behrens v. McKenzie, 23 Iowa, 333; Gribben v. Maxwell, 7 Pac. Rep. 584; Allen v. Berryhill, 27 Iowa, 534; Rhodes v. Fuller, 139 Mo. 179; Schaps v. Lehner, 54 Minn. 208; Odom v. Riddick, 104 N. C. 515; Eldredge v. Palmer, 185 Ill. 618; Bank v. Moore, 78 Pa. St. 407, where a lunatic was held liable upon a note discounted by him at

or negligence, would be prejudiced by setting it aside. Both parties are faultless, and therefore stand equal before the law; and in the forum of conscience the law will not lend its active interposition to effectuate a wrong or prejudice to either, but will suffer the misfortune to remain where nature has cast it.[4]

It must, of course, be understood that the circumstances attending the case have much to do with the application of the rule last stated whenever it is invoked as a rule. Insanity is a mysterious disease, sometimes affecting the mind only in its relation to or connection with a particular subject, leaving it apparently sound and rational as to all others; and many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be unjust, therefore, that such persons should be allowed to retain the property of innocent parties, or to retain their own property and its price;[5] and in this light the rule, as stated, is applied.

The deed of a lunatic is not void, but, like that of other persons incompetent or disabled, voidable only, and is effectual to pass title with all its incidents if unassailed.[6] The authorities are contradictory upon this point, however, and in a number of cases it has been held that the deed of an insane grantor, executed before an inquisition of lunacy, is not merely voidable but void,[7] though it would seem, where this view is taken, that to establish invalidity it must appear that the grantor at the time of execution was absolutely without capacity to understand or comprehend the nature of the

the bank; Scanlan v. Cobb, 85 Ill. 296; Freed v. Brown, 55 Ind. 310; Young v. Stevens, 48 N. H. 133; Eaton v. Eaton, 37 N. J. L. 108; and see 2 Kent Com. (11th ed.) 583. The English cases also sustain this view.

[4] Cole, J., in Allen v. Berryhill, 27 Iowa, 534; and see Wilder v. Weakley, 34 Ind. 181; Henry v. Fine, 23 Ark. 417.

[5] Bank v. Moore, 78 Pa. St. 407; Young v. Stevens, 48 N. H. 133.

[6] Wait v. Maxwell, 5 Pick. (Mass.) 217; Badger v. Phinney, 15 Mass. 359; Ingraham v. Baldwin, 9 N. Y. 45; Crouse v. Holman, 19 Ind. 30; Chew v. Bank, 14 Md. 299; Hovey v. Hobson, 53 Me. 451; Elston v. Jasper, 45 Tex. 409; Mohr v. Tulip, 40 Wis. 66; Eaton v. Eaton, 37 N. J. L. 108; Nichol v. Thomas, 53 Ind. 42; Castro v. Geil, 110 Cal. 292.

[7] Rogers v. Walker, 6 Pa. St. 371; Van Deusen v. Sweet, 51 N. Y. 378; Rogers v. Blackwell, 49 Mich. 192; but see Moran v. Moran, 106 Mich. 8; Eldredge v. Palmer, 185 Ill. 618.

transaction.[8] The volume of authority sustains the first proposition as stated, and, generally, where the deeds of demented persons are set aside the consideration paid therefor must be restored.[9]

After a person has by inquest been found to be of unsound mind, he should, so long as the unsoundness continues to exist, be regarded for most if not all purposes of business as civilly dead,[10] and a deed thereafter executed by him would be absolutely void.[11]

The right of disaffirmance being raised for the personal protection of the insane person it follows that those who deal with him have no corresponding rights. The rule is much the same as in the case of infants and where one has contracted with an insane person, although unaware of his infirmity at the time, he will be held to the performance of the contractual undertaking unless he has been misled by some fraudulent artifice or misrepresentation.[12]

§ 74. **Imbeciles.** Mere weakness of mind, when unaccompanied by any circumstances showing imposition or undue advantage,[13] forms no objection to the validity of a contract,[14] for the law does not graduate intellectual differences on a nicely adjusted scale; nor does it seem that partial insanity or monomania,[15] unless it exists with reference to the contract,[16] will create incapacity unless coupled with other circumstances. That the mental powers have been somewhat impaired by age is not sufficient to invalidate a deed,[17] unless it can be shown that the purchaser took unfair advantage of the vendor's mental incapacity; and if he be still capable of transacting his ordinary business—if he understands the

[8] Aldrich v. Bailey, 132 N. Y. 85.

[9] Eldredge v. Palmer, 185 Ill. 618.

[10] McNees v. Thompson, 5 Bush (Ky.), 686.

[11] Rhoades v. Fuller, 139 Mo. 179; Griswold v. Butler, 3 Conn. 227; Elston v. Jasper, 45 Tex. 409.

[12] Atwell v. Jenkins, 163 Mass. 362; Allen v. Berryhill, 27 Iowa, 534; Harmon v. Harmon, 51 Fed. Rep. 113.

[13] Mann v. Betterly, 21 Vt. 326; Young v. Stevens, 48 N. H. 133; Cain v. Warford, 33 Md. 23.

[14] Somers v. Pumphrey, 24 Ind. 231; Baldwin v. Dunton, 40 Ill. 188; Willemin v. Dunn, 93 Ill. 511; Mann v. Betterly, 21 Vt. 326.

[15] Burgess v. Pollock, 53 Iowa, 273.

[16] Emery v. Hoyt, 46 Ill. 258; Staples v. Wellington, 58 Me. 453.

[17] Lindsey v. Lindsey, 50 Ill. 79; Beverly v. Walden, 20 Gratt. (Va.) 147.

nature of the business in which he is engaged, and the effect of what he is doing, and can exercise his will with reference thereto—his acts will be valid and binding.[18]

Transactions with persons of feeble mind are always subject to close scrutiny, however, and, unlike those between parties of unimpaired mental faculties, will be set aside on slight grounds after the disability has been shown to exist. Where one of the parties to a contract at the time of its execution was laboring under mental weakness, a court of equity will investigate the consideration and determine its sufficiency, as well as pass upon the party's mental state and condition; and if inadequacy of consideration and mental imbecility concur, although the weakness of mind does not amount to idiocy or legal incapacity, the contract will be annulled at the instance of such party. In this class of cases, it would seem, it is not necessary to show that the complaining party was actually misled by fraud or dominated by undue influence.[19]

Persons born deaf and dumb are, by the common law, *prima facie non compos mentis,* and without sufficient understanding to know and comprehend their rights, duties and liabilities. The improved methods of educating such persons adopted at the present day develop in them a higher degree of intelligence, however, than it was formerly supposed they possessed, and to some extent has modified the ancient rule. Yet as the want of hearing and speech must necessarily prevent a full development of their intellectual powers, and place them at a great disadvantage in their dealings with others, the law throws around them for their protection the presumption of incapacity to manage their own affairs until the contrary is shown.[20]

[18] English v. Porter, 109 Ill. 285; Cadwallader v. West, 48 Mo. 483; Lozear v. Shields, 23 N. J. Eq. 509.

[19] Wray v. Wray, 32 Ind. 126. In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the contracting party is from age or weakness of disposition likely to be imposed upon, the statement of a consideration when there was none, or improvidence of the transaction, are circumstances which furnish a probable, though not always a certain, test of undue influence or fraud. Cadwallader v. West, 48 Mo. 483.

[20] Oliver v. Berry, 53 Me. 206; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441.

§ 75. **Drunkards.** It is a well-established principle of the common law that intoxication does not of itself render a contract void or relieve the contracting parties from its consequences, notwithstanding it may be such as to lead them into imprudent and disadvantageous engagements.[21] Were it otherwise, drunkenness, it is said, would be the cloak of fraud. But, on the other hand, where it is such as not to leave to men the power of perceiving and assenting, they cannot be bound, because the very essence of every contract is the assent of the contractor to what he may be presumed to understand; and hence, where the power of assent is wanting, where reason, memory and judgment have been drowned, leaving such an impairment of the mental faculties as amounts to positive incapacity to act or comprehend, the transaction may be avoided for that reason.[22]

To avoid responsibility, however, on the ground of intoxication, the proof of mental incapacity must be clear and convincing;[23] for a drunkard is not incompetent, like an idiot or one generally insane,[24] and the proof must show that at the time of the act in question his understanding was clouded or his reason dethroned by actual intoxication;[25] while some authorities hold that, notwithstanding he may have been so drunk at the time as to be incapable of judging correctly or acting prudently, he will still be held to the contract, unless it can be shown that the intoxication was procured with the consent or by the contrivance of the other party, or that fraud or duress was employed.[26] The volume of authority, however, does not seem to sanction this view; and it may now be considered a settled principle, according to the dictates of good sense and common justice, that a contract made by a person

[21] Bates v. Ball, 72 Ill. 108; Joest v. Williams, 42 Ind. 565; Broadwater v. Darne, 10 Mo. 277; Johns v. Fritchey, 39 Md. 258; Caulkins v. Fry, 35 Conn. 170; Peck v. Cary, 27 N. Y. 9.

[22] French v. French, 8 Ohio, 214; Van Wyck v. Brasher, 81 N. Y. 260; Wilcox v. Jackson, 51 Iowa, 208; Dunn v. Amos, 14 Wis. 106; Johns v. Fritchey, 39 Md. 258; Johnson v. Phifer, 6 Neb. 401; Freeman v. Staats, 8 N. J. Eq. 814.

[23] Bates v. Ball, 72 Ill. 108.

[24] Van Wyck v. Brasher, 81 N. Y. 260.

[25] Gardner v. Gardner, 22 Wend. (N. Y.) 526 Peck v. Cary, 27 N. Y. 9; Johns v. Fritchey, 39 Md. 258.

[26] Bates v. Ball, 72 Ill. 108; Rodman v. Zilley, 1 N. J. Eq. 320.

so destitute of reason as not to know the consequences of his contract, even though his incompetency be produced by intoxication, is voidable, and may be avoided by himself; and this, too, although the intoxication was voluntary, and not procured by the circumvention of the other party.[27]

Ordinarily, to defend against a contract on the ground of intoxication, it must have been rescinded by restoring, or by an offer to restore, whatever was received therefor as a consideration;[28] and if the drunkard, during his sober intervals and with knowledge of what he has done, keeps the consideration received,[29] or by other unequivocal act or declaration indicates an intention to ratify what he has done, the contract will be regarded as affirmed.[30]

A protection against waste and improvidence has been created in most of the states by a special statute providing for a conservator or committee to manage and control the drunkard's estate; and when a man has been found, by inquisition duly taken in pursuance of the statute, to be incapable of conducting his own affairs in consequence of habitual drunkenness, his property—real as well as personal—is taken out of his hands and put into the custody and control of such committee. The trust thus created continues without interruption until the death of the drunkard or the superseding of the commission, and all business relating to the drunkard's estate must be transacted with the conservator or committee until the inquisition has been set aside.[31] The fact that the drunkard has sober intervals in no way alters the case, and during such intervals he has no more authority to deal with or dispose of his property than while he is in a state of intoxication; nor will the further fact that the other contracting party acted

[27] Broadwater v. Darne, 10 Mo. 277; Miller v. Finley, 26 Mich. 254; Mansfield v. Watson, 2 Iowa, 111; Belcher v. Belcher, 10 Yerg. (Tenn.) 121; and see Scanlan v. Cobb, 85 Ill. 296; Johns v. Fritchey, 39 Md. 258.

[28] Joest v. Williams, 42 Ind. 565; Cummings v. Henry, 10 Ind. 109.

[29] Joest v. Williams, 42 Ind. 565.

[30] The rule with respect to intoxicated persons is practically the same as in cases of infancy; and any distinct, unequivocal act, after becoming sufficiently sober to comprehend the nature of the transaction, manifesting an intention to be bound by the contract and inconsistent with its disaffirmance, will amount to a ratification. Mansfield v. Watson, 2 Iowa, 111.

[31] Wadsworth v. Sharpsteen, 8 N. Y. 388; Redden v. Baker, 86 Ind. 195.

in good faith and with no actual notice of the inquisition confer upon him any additional rights or furnish ground for equitable relief. From the very nature and object of the proceeding the inquisition must be regarded as conclusive evidence of the incapacity of the drunkard to dispose of his property or contract obligations in regard thereto; and of this proceeding those dealing with him must take notice. This rule may sometimes be a hard one, but it can never be said to be unjust; nor does it violate the general rule that a decree or other judicial proceeding binds those only who are parties to it, as these proceedings are matters of public interest and concern, to which no one can strictly be said to be a stranger.[32]

§ 76. **Convicts.** At common law a person convicted of treason or felony was placed in a state of attainder, the consequences of which were forfeiture of estate, corruption of blood, and a total deprivation of civil rights; in other words, he became dead in law, and this condition was termed "civil death." The exact status of a person so conditioned does not seem to be altogether clear so far as respected his contractual rights, but it would seem that in any event he was unable to invoke the aid of a court to enforce his contracts or to obtain any relief against them.

The term "civil death" has been retained in the statutes and codes of a number of states, but no very definite meaning attached, and, for this reason, it has been made the subject of considerable controversy. But notwithstanding the retention of the term it would seem, under the interpretation of the courts, to imply nothing more than a deprivation of political rights, leaving the civil rights of the convict in large measure unimpaired. Particularly is this true with respect to his property, and it may be said that the forfeitures and disabilities of the common law in regard to same are unknown in the United States.[33] A convicted felon may dispose of his property by will or deed, and, it would seem, may enter into contractual relations and make effective agreements concerning it.[34]

[32] Wadsworth v. Sharpsteen, 8 N. Y. 388.

[33] They have practically been abolished by statute in England.

[34] See Davis v. Laning, 85 Tex. 39; Coffee v. Haynes, 124 Cal. 561; Avery v. Everett, 110 N. Y. 317; Willingham v. King, 23 Fla. 478; Frazer v. Fulcher, 17 Ohio, 260.

Article IV. Fiduciaries.

§ 77. General principles.
78. Trustees.
79. Mortgagees.
80. Executors and administrators.
81. Continued—Executors.
82. Continued— Administrators.
83. Guardians.
84. Trustees as purchasers—The rule stated.
85. Continued—Exceptions to and qualifications of the rule.

§ 77. **General principles.** A very large proportion of the sales of real property in the United States are made through the media of fiduciaries and trustees. They include not only trustees proper, but all who act under a power, as mortgagees, executors, guardians, etc.; and the same general principles are equally applicable to all of the different classes and relations. Courts of equity will scrupulously examine the conduct of persons acting in a fiduciary or trust capacity, and protect the trust property from waste, whether it arises from the actual or constructive fraud of the trustee acting with the party taking the undue advantage, or from the fraud of the latter alone.[1] The presumption is, however, that parties charged with a trust perform their duty until the contrary appears; and, when an act is susceptible of two opposite constructions, one consistent with innocence and fidelity to duty and the other the reverse, the law presumes in favor of innocence and fidelity.[2]

§ 78. **Trustees.** By the rules of the common law, as well as by statutory enactments in many states, a trustee to whom land has been conveyed is regarded as possessing the full legal title, the legal estate in his hands being attended by the same incidents and having the same properties that it would have were he the usufructuary owner.[3] In equity he was formerly treated as the legal owner, and for many purposes is still so considered, although obliged to use the land for the declared objects and avowed purposes of the trust. At the present time, and in the United States, the generally-accepted doctrine is that

[1] Moore v. School Trustees, 19 Ill. 83.

[2] Munn v. Burges, 70 Ill. 604.

[3] Devin v. Hendershott, 32 Iowa, 192; Beach v. Beach, 14 Vt. 28.

a trustee takes an estate commensurate in extent and duration with the object and extent of the trust. Its creation gives him not only a power but an estate; and if the trusts require an estate in fee, such will devolve on the trustee irrespective of any words of purchase or limitation.[4]

A conveyance by the trustee has, at common law, the effect of a complete transfer, which is as effectual ordinarily as though he also possessed the beneficial estate;[5] and even though the conveyance may have been in violation of the trust, his vendee will nevertheless hold the legal title, the question as to his right to convey being of equitable cognizance only, and hence not to be inquired into by a court of law.[6] The revised statutes of some of the states provide that, where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustee in contravention of the trust shall be absolutely void, the object being to protect beneficiaries from the unauthorized acts of their trustees by charging persons dealing with the latter with knowledge of the trust. Under these statutes the courts have held that any sale or conveyance in contravention of the trust is ineffectual to pass the title, and that the legal estate, notwithstanding the conveyance, remains in the trustee.[7] Independent of any statute, however, there is no doubt but that persons dealing with a trustee on the faith of the trust estate are bound at their peril to take notice of the scope of his powers;[8] and where a trust deed, or other instrument creating the trust, minutely and particularly describes the circumstances under which and the manner in which the trustee shall have authority to act, he will have no power or

[4] Welch v. Allen, 21 Wend. (N. Y.) 147; West v. Fitz, 109 Ill. 425; Doe v. Ladd, 77 Ala. 223; Leonard v. Diamond, 31 Md. 536; Stockbridge v. Stockbridge, 99 Mass. 244.

[5] Bank v. Benning, 4 Cranch (U. S.), 81; Thatcher v. St. Andrew's Church, 37 Mich. 264; Dawson v. Hayden, 67 Ill. 52; R. R. Co. v. Green, 68 Mo. 169; Packard v. Marshall, 138 Mass. 301.

[6] Canoy v. Troutman, 7 Ired. L. (N. C.) 155; Dawson v. Hayden, 67 Ill. 52.

[7] Anderson v. Wood, 44 N. Y. 249; Russell v. Russell, 36 N. Y. 581; Douglas v. Cruger, 80 N. Y. 15. The statute does not seem to have been very generally enacted, and appears to be confined to New York, California and possibly a few other states.

[8] Owen v. Reed, 27 Ark. 122; Vernon v. Board of Police, 47 Miss. 181.

authority to dispose of the trust property under any other circumstances or in any other manner.[9] If the power to convey can be exercised only on the happening of an event which is a condition precedent, the purchaser must ascertain at his peril whether the condition has been fulfilled.[10]

Again, if one who holds a legal title in trust for, or who is equitably bound to convey to, another, transfers the legal title to a third person with notice of the trust, such purchaser will himself become a trustee, and as much bound to convey to the real owner as if he had acquired the title with an express agreement to perform the trust.[11] He can only hold it subject to the liability of his vendor to respond to the existing trust, and cannot be heard to defeat it, notwithstanding he may have purchased for a full consideration.[12]

Lands held in trust by several persons are incapable of partition and can only be conveyed by the joint act of all;[13] and, if any one or more of them assume to act without the concurrence of the other, the conveyance will not pass the legal title to the property.[14]

§ 79. **Mortgagees.** Sales and conveyances by mortgagees, acting under and in pursuance of a power, differ in no important particular from conveyances by trustees acting in a like capacity, the mortgagee being, for the purposes of the conveyance, an executor of an express trust. He is held to the same strict rules that regulate the conduct of other trustees, and cannot exceed the express powers under which he acts. A mortgagee may sell the equity of redemption of the mortgagor and such interest as is conveyed to him by the mortgage under which he sells, but he cannot sell the equity of redemption by itself; nor can he sell an undivided portion

[9] Huntt v. Townshend, 31 Md. 336; Mills v. Taylor, 30 Tex. 7.

[10] Griswold v. Perry, 7 Lans. (N. Y.) 98.

[11] Jackson v. Matsdorf, 11 Johns. (N. Y.) 91; Carpenter v. McBride, 3 Fla. 292; Ryan v. Doyle, 31 Iowa, 53; Kent v. Plumb, 57 Ga. 207; Ham v. Ham, 58 N. H. 70; Sadler's Appeal, 87 Pa. St. 154; Gray v. Ulrich, 8 Kan. 112; Isom v. Bank, 52 Miss. 902; Gale v. Hardy, 20 Fla. 171; Smith v. Walter, 49 Mo. 250.

[12] Webster v. French, 11 Ill. 254; Bethel v. Sharp, 25 Ill. 173.

[13] Sinclair v. Jackson, 8 Cow. (N. Y.) 543; Goldep v. Bressler 105 Ill. 419; Heard v. March, 12 Cush. (Mass.) 580; Ham v. Ham, 58 N. H. 70.

[14] Larned v. Welton, 40 Cal. 349; Morville v. Fowle, 144 Mass. 109.

of his interest in the land included in the mortgage. A proper execution of the power of sale requires him to sell all he is entitled to under it,[15] and for the same reason he has no right to sell a greater interest than the mortgage gives to him or authorizes him to sell. A violation of these rules will render the sale invalid.[16] The original purchaser at a sale by a mortgagee, under a power of sale contained in the mortgage, is chargeable with notice of defects and irregularities attending the sale, and cannot evade their effect, but it would seem that, as to remote purchasers, the sale is only voidable on proof of actual knowledge of such defects.[17] It has been held, however, that a properly executed deed reciting strict conformity, the purchaser having no actual knowledge or notice of any irregularity, and taking such deed upon the strength of the assurances therein contained, will protect the title of such purchaser.[18]

§ 80. **Executors and administrators.** Executors and administrators stand in the position of trustees of those interested in the estates upon which they administer. An executor may sell and convey lands held in special trust without the intervention of a court, but not such lands as are sold in due course of administration to pay decedent's debts, while an administrator can do no act affecting lands without special orders of a court. In case of sales by either officer, no title passes until the execution and delivery of a deed;[19] and, without such title as the deed conveys, the purchaser cannot maintain or defend ejectment against or by the heir.[20]

§ 81. **Continued — Executors.** A testamentary executor

[15] Fowle v. Merrill, 10 Allen, 350; Torrey v. Cook, 116 Mass. 163.

[16] Donohue v. Chase, 11 Reporter, 225.

[17] Hamilton v. Lubukee, 51 Ill. 415; but see Hosmer v. Campbell, 98 Ill. 572.

[18] Hosmer v. Campbell, 98 Ill. 572. Where a deed for land sold under a power in a mortgage, reciting correctly all the facts showing a right to make the sale, is recorded in apt time, the record thereof will affect all persons thereafter claiming under the mortgagor with constructive notice that there had been a valid sale under the power, although the deed may be defectively executed so as not to pass the legal title. Gibbons v. Hoag, 95 Ill. 45.

[19] Although it seems a properly conducted sale, after confirmation, will vest an equitable title in the purchaser.

[20] Doe v. Hardy, 52 Ala. 291; Gridley v. Phillips, 5 Kan. 349.

stands in the place of and represents his testator. He derives his power primarily from the will, and in this respect differs somewhat from an administrator, whose sole power is derived from the law and the directions of the court.[21] When acting under a naked testamentary appointment, his powers are co-extensive with those of the administrator, and he is bound by the same rules and subject to the same restrictions. But the executor may also be a trustee,[22] and, when acting as such, the scope of his powers is measured and limited by the will which appoints him. Under his testamentary authority he may sell land and otherwise execute the trusts and exercise the powers enumerated and conferred in the will, subject to the general regulations of the statute, and free from the control or intervention of a court;[23] but where authority is not expressly given, or where, during the administration, he performs the ordinary offices of an executor, as where land is sold to pay the debts of decedent, no express power being given, he must first obtain authority or license from the probate court; and his sale must be reported to and confirmed by such court before a deed can lawfully issue to the purchaser.

§ 82. **Continued — Administrators.** An administrator is regarded as an executive officer of the court, while he also occupies the relation of trustee to the estate, its creditors and distributees.[24] Although he may not possess as much power as an executor, the latter deriving his power from the testator and the law, and the administrator from the law only,[25] he yet possesses all necessary power to sell property, negotiate securities, and to settle and pay debts,[26] but under the order and

[21] Walker v. Craig, 18 Ill. 116; Van Wickle v. Calvin, 23 La. Ann. 205; Gilkey v. Hamilton, 22 Mich. 283.

[22] Pitts v. Singleton, 44 Ala. 363.

[23] Buckingham v. Wesson, 54 Miss. 526; Whitman v. Fisher, 74 Ill. 147; Cronise v. Hardt, 47 Md. 433; Jelks v. Barrett, 52 Miss. 315; Hughes v. Washington, 72 Ill. 84. But the power must be explicit; general words do not confer power to sell lands. Skinner v. Wood, 76 N. C. 109.

[24] Wingate v. Pool, 25 Ill. 118; State v. Meagher, 44 Mo. 356.

[25] Gilkey v. Hamilton, 22 Mich. 283.

[26] Walker v. Craig, 18 Ill. 116. Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities; and, ordinarily, only so much should be sold as is neces-

direction of the court. He takes neither an estate, title nor interest in the lands of his intestate,[27] but a mere naked power to sell for specific purposes.[28] He takes the land as he finds it,[29] and, having no interest therein, can maintain no action to perfect the title or relieve it of any burden,[30] and must sell it as he finds it.[31] The power to sell is a personal trust, which cannot be delegated;[32] and the sale, being a fiduciary act based upon statute, must strictly comply with all the provisions of law.[33]

The doctrine of *caveat emptor* applies to all sales by an administrator,[34] or other officer acting in a ministerial capacity; and the purchaser, who is presumed to have made all necessary inquiries, takes the title at his peril,[35] and subject to all liens except those for the payment of which the land is sold.[36] The purchaser has no right to the land until the sale has been confirmed;[37] but where the sale has been made under a proper order of the court, and reported to and confirmed by it, it conveys title even though the proceedings be irregular.[38]

It may happen that an executor or administrator, without authority, invests the funds of the decedent's estate in land; or he may take land in payment of a debt due to the estate which he represents, or may purchase it for the protection of the estate at an execution sale under a judgment belonging to the estate. Under such circumstances the executor or administrator in one sense holds the land in trust for the persons beneficially interested in the estate, and can be compelled to account for it. Such land, however, would not come under the same rules as if it had been the property of the

sary for that purpose. Newcomer v. Wallace, 30 Ind. 216; Foley v. McDonald, 46 Miss. 238.

[27] Ryan v. Duncan, 88 Ill. 144; Stuart v. Allen, 16 Cal. 473.

[28] Smith v. McConnell, 17 Ill. 135; Floyd v. Herring, 64 N. C. 409.

[29] Gridley v. Watson, 53 Ill. 186.

[30] Le Moyne v. Quimby, 70 Ill. 399; Ryan v. Duncan, 88 Ill. 146.

[31] Martin v. Beasley, 49 Ind. 280.

[32] Chambers v. Jones, 72 Ill. 275; Gridley v. Philips, 5 Kan. 349.

[33] Fell v. Young, 63 Ill. 106; Lockwood v. Sturdevant, 6 Conn. 386; Corwin v. Merritt, 3 Barb. 341.

[34] McConnell v. Smith, 39 Ill. 279.

[35] Bishop v. O'Connor, 69 Ill. 431.

[36] Henderson v. Whitinger, 56 Ind. 131.

[37] Mason v. Osgood, 64 N. C. 467; Rawlings v. Bailey, 15 Ill. 178.

[38] Thorn v. Ingram, 25 Ark. 52; Myer v. McDougal, 47 Ill. 278. Compare Chase v. Ross, 36 Wis. 267.

decedent at the time of his death; and the effect of a conveyance to the executor or administrator under circumstances similar to those mentioned would be to vest in such person the entire legal title with all its incidents, including a full power of disposition, he of course remaining liable to account for its proceeds to those interested in the estate. So, too, land bought in by executors or administrators on a foreclosure of a mortgage belonging to the estate is to be treated as personal property and to be accounted for as such; and whether the deed is taken in the names of such persons in their official capacity or individually is immaterial so far as respects heirs and devisees. In such event the entire title is held by such personal representatives, while the land thus purchased by them is regarded as a substitute for the mortgage foreclosed, and takes its place for all purposes as between the executor or administrator and the parties interested in the estate. The land itself may be sold by the executor or administrator in the exercise of their own discretion; while the beneficiaries under the estate having no direct interest in the property, cannot dispute or question the title of a purchaser.[39]

§ 83. **Guardians.** The law permits conveyances by guardians, conservators, committees, etc., of the real estate of their wards whenever the sale of such property may be necessary or expedient for the payment of debts, the support and education of the ward, an investment of the proceeds, or other similar conditions. Such property can only be sold, however, under the order of a court of competent jurisdiction, and a confirmation after sale is necessary to give it validity.[40] A conveyance by the guardian in any other manner is unauthorized; and where one purchases the real estate of minors from a guardian, directed by order of court to sell it, notwithstanding he takes a deed from such guardian, if the sale is never reported to or confirmed by the court, he cannot maintain his title against a subsequent conveyance made by the minors after coming of age.[41]

[39] Lockman v. Reilly, 95 N. Y. 64; Long v. O'Fallon, 19 How. (U. S.) 116.

[40] People v. Circuit Judge, 19 Mich. 296; White v. Clawson, 79 Mich. 188; Chapin v. Curtenius, 15 Ill. 427.

[41] Titman v. Riker, 10 Atl. Rep. 397. The guardian in such cases is the agent of the court, and can

The right of a guardian to thus dispose of the property of his ward is given by statute, and strict compliance with statutory requirements is always exacted. A person who purchases at a guardian's sale, or even one who purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make same, and if any of the mandatory provisions of the statute have not been complied with the sale will be void.[42] And it seems, that even though the proceeds of the sale may have been applied toward the maintenance and education of the wards, this will not estop them from denying the validity of same,[43] although, as to this point, the authorities are not agreed.[44]

§ 84. **Trustees as purchasers—The rule stated.** As a vendee, a trustee is under stringent restrictions, so far as his dealings with the trust property is concerned; and the rule is beyond dispute that the purchase by a trustee, directly or indirectly, of any of the trust estate which he is empowered to sell as a trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the property.[45]

Nor is the application of this rule confined to any particular

take no lawful step without authority from his principal. The nature and extent of his authority is derived from the statute, which is the foundation for the whole proceeding. As a rule the statute is peremptory, and its provisions cannot be disregarded or avoided; and if, in dealing with the rights of infants or others under disability, a guardian might in one particular take the law in his own hands and assume prerogatives of the court, then he might in every other. And the same remarks are applicable to the purchaser. If he accepts title under such circumstances he does it at his peril, and with every means at hand for the fullest information.

[42] Bachelor v. Korb, 58 Neb. 122; Williams v. Morton, 38 Me. 47; Tracy v. Roberts, 88 Me. 310.

[43] Wilkinson v. Filby, 24 Wis. 441; Requa v. Holmes, 26 N. Y. 338; Rowe v. Griffiths, 57 Neb. 488.

[44] See Deford v. Mercer, 24 Iowa, 118; Penn v. Heisey, 19 Ill. 265.

[45] Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in a judgment or decree authorizing the sale. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equi-

class of persons, such as guardians, executors, trustees, etc.; but it is a rule of universal application to all persons coming within its principle, which is that no person can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser,[46] or do any other act which has a tendency to interfere with the faithful discharge of such duty.[47] The reason of the rule is not because trustees might not, in many instances, make fair and honest disposition of the trust estate to themselves, but because the probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely than to assume them to be valid except where they can be proved to be fraudulent. Therefore, it is wholly immaterial that the transaction may have been fair, profitable or advantageous to the beneficiary. The rule forbidding this conflict between interest and duty is no respecter of persons. It imputes constructive fraud because the temptation to actual fraud and the facility of concealing it are so great; and it imputes it to all alike, who come within its scope, however much or however little open to suspicion of actual fraud.[48]

It is further to be observed that the principle which prohibits the trustee from becoming a purchaser extends to all sales of the trust property, whether made by the trustee himself under his powers as trustee or under an adverse proceeding. As a general trustee of the property it is his duty to make it bring as much as possible at any sale that may take place; and, therefore, he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.[49]

Agents may be *quasi* trustees, and so far be brought within

ties between the parties to the action, or between such parties and others. Fulton v. Whitney, 66 N. Y. 548.

[46] Blake v. R. R. Co. 56 N. Y. 485; Cook v. Berlin Mill Co. 43 Wis. 433; Grumley v. Webb, 44 Mo. 444; Roberts v. Roberts, 65 N. C. 27; Goodwin v. Goodwin, 48 Ind. 584; Sheldon v. Rice, 30 Mich. 296; McGowan v. McGowan, 48 Miss. 553; Beauvelt v. Ackerman, 20 N. J. Eq. 141; Campbell v. McLain, 51 Pa. St. 200; Dempster v. West, 69 Ill. 613; Higgins v. Curtis, 82 Ill. 28.

[47] Gibson v. Herriott, 55 Ark. 85.

[48] Cook v. Berlin Mill Co. 43 Wis. 433.

[49] Martin v. Wyncoop, 12 Ind. 266.

the principle of the broad rule applicable to trustees generally that they cannot become purchasers from their principals; but an agent generally comes within this rule only when his agency is so connected with the sale as to make it his duty to obtain the best terms for his principal, when he cannot be agent to sell and principal to buy.

But after the trust is executed a trustee stands in the same position as a stranger. If, as such trustee, he has made a sale under his power, or in good faith has otherwise fully discharged his trust, so that he no longer occupies confidential relations to any one claiming the property, he is not by law forbidden to deal with what was the trust property the same as a stranger; and, acting in good faith, he may become the owner by purchase or otherwise.[50]

§ 85. Continued—Exceptions to and qualifications of the rule. Where, however, a trustee has an interest to protect by bidding at a sale of the trust property, and for this purpose makes a special application to the court for permission to bid, which upon the hearing of all the parties interested is granted, he may make a purchase which is valid and binding upon all the parties interested, and under which he can acquire a perfect title.[51]

So, also, where a trustee has purchased land at his own sale which is afterwards clearly and unequivocally affirmed by the beneficiary, if all parties have acted in good faith, and the beneficiary, being under no disability and with full knowledge of all the facts, has consented thereto, he may be concluded thereby, and the title in the hands of the trustee be unassailable for this cause,[52] and even though there has been no direct affirmance a beneficiary may still be precluded from relief by his own laches, neglect and delay. A sale of this kind is voidable at the application of the person holding the equity, provided such application is made in a reasonable time, without any showing of fraud or injury, but this right may be lost through laches. Courts of equity are slow to grant relief on stale claims and while there are no established

[50] Bush v. Sherman, 80 Ill. 160; Watson v. Sherman, 84 Ill. 263.

[51] Gallatin v. Cunningham, 8 Cow. (N. Y.) 361; Colgate v. Colgate, 23 N. J. Eq. 372; Froneberger v. Lewis, 79 N. C. 426; Michoud v. Girod, 4 How. (U. S.) 503.

[52] Boerum v. Schenck, 41 N. Y. 182; Brantly v. Cheeley, 42 Ga. 209; Scott v. Mann, 33 Tex. 721.

rules by which laches can always be determined, the matter being usually left to the sound discretion of the court,[53] yet if the beneficiary stands by and sees the property being developed and augmented in value by lasting and permanent improvements, or when from other reasons growing out of passive acquiescence or delay it would be inequitable or unjust to permit him to reclaim the property, the laches may furnish sufficient grounds to preclude him from relief.[54]

A marked exception to the rule is also made in favor of guardians *ad litem*. Unlike other guardians and ordinary trustees, a guardian *ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property which may be sold in the suit or proceeding in which he acts. If he has fairly advised the court of the infant's rights, and done all for him that the facts of the case required him to do, he may purchase and hold in his own right the property of the infant, sold under an order of court in the cause in which he was appointed, provided such purchase was in good faith and for a full and valuable consideration paid by him.[55]

[53] Sullivan v. R. R. Co. 94 U. S. 806; Castner v. Walrod, 83 Ill. 171; Spaulding v. Farwell, 70 Me. 17; Hanson v. Worthington, 12 Md. 418; Searcy v. Hunter, 81 Tex. 644.

[54] Oil Co. v. Marbury, 91 U. S. 587; Flanders v. Flanders, 23 Ga. 249; Compare Cartwright v. McGowan, 121 Ill. 388.

[55] The text states the general rule but it would seem that in some states a guardian *ad litem* is, by statute, placed under the same disabilities as other trustees. See Boyer v. East, 161 N. Y. 580.

CHAPTER III.

THE MEMORANDUM.

§ 86. Contract and memorandum distinguished.
87. Statutory requirements.
88. The signature.
89. Signature of one party only sufficient.
90. Signature by agent.
91. Signature by corporation.
92. The contracting parties.
93. The terms.
94. The consideration.
95. The purchase price.
96. Description of the property.
97. The interest to be conveyed.
98. Time.
99. Receipts.
100. Letters.
101. Telegrams.
102. Delivery.
103. Continued — Undelivered deeds.

§ 86. Contract and memorandum distinguished. It is a familiar proposition that contracts for the sale of land, to insure legal enforcement, must be in writing. Strictly speaking, however, this is an error; for it must be observed that the contract itself, and the memorandum which is necessary to its validity under the statute of frauds, are in their nature different and distinct things.[1] The contract, in a majority of cases, is fully made by parol before the memorandum is prepared, and may be perfect and complete, and under certain circumstances enforceable without having been reduced to writing. The contract itself, so far as respects its validity,[2] is unaffected by the statute, and if executed the rights and

[1] Lerned v. Wannemacher, 9 Allen (Mass.), 416; Williams v. Bacon, 2 Gray (Mass.), 391; Ide v. Stanton, 15 Vt. 690; Gale v. Nixon, 6 Cow. (N. Y.) 445; and see Montgomery v. Edwards, 46 Vt. 151.

[2] Mr. Causten Browne, in his valuable treatise on the statute of frauds, has defined the operation of the statute as the mere prescription of a rule of evidence. In the last (4th) edition he recedes somewhat from his proposition, though still asserting his belief that this view is the true one. It would seem that this proposition should pass unchallenged as a rule that is fully sustained by reason and precedent, and that he truly states when he says: "The cases which are inconsistent with it rest upon uncertain ground." Whatever may be its effect in respect to its other clauses it is certain that the construction of and operation given to the fourth section—the one relating to contracts and sales of lands—by the courts of the country, is in full accord with Mr. Browne's first definition.

obligations of the parties remain the same as though a strict compliance had been made.[3] The memorandum is only legal evidence of the contract.

§ 87. **Statutory requirements.** The question as to what constitutes a memorandum or note in writing, signed by the party to be charged, in compliance with the requirements of the statute, has been the subject of much discussion and greatly varying decisions ever since its adoption. The natural repugnance of right-thinking men to permit the success of unfair dealings has furnished many instances where the language and meaning of the statute has been manifestly strained; and many cases have gone to the very verge, if not beyond the bounds, of a reasonable and fair construction, or rather facts have been strained to constitute a compliance with statutory requirements.

The statutory directions concerning the form and contents of memoranda of sale are at best extremely meager, and questions relative to their sufficiency in this particular are largely left to the discretion of the courts. It is a peremptory mandate of the statute that they shall be in writing and signed by the person to be charged or his agent; but, aside from this, form is not important,[4] nor need they be attended with any particular solemnities.[5] And while they must be in writing, the method employed is immaterial, for the written characters may consist of manuscript or print, or both combined;[6] and though made with a lead-pencil they will still be sufficient.[7] Nor is it necessary that the contract be evidenced by a single document,[8] for all the contemporaneous writings between the parties relating to the same subject-matter are admissible in evidence to show the transaction.[9] It is essential that all the terms of the contract be specifically and dis-

[3] Ryan v. Tomlinson, 39 Cal. 639; Stone v. Dennison, 13 Pick. (Mass.) 1.

[4] Doty v. Wilder, 15 Ill. 407; McConnell v. Brillhart, 17 Ill. 354; Tripp v. Bishop, 56 Pa. St. 424; Jenkins v. Harrison, 66 Ala. 345.

[5] Bryne v. Marshall, 44 Ala. 355; Williams v. Morris, 95 U. S. 444; Hawkins v. Chace, 19 Pick. (Mass.) 502.

[6] But when a printed form is filled by writing, the written part will control in construing the contract.

[7] Merritt v. Clason, 12 John. (N. Y.) 102.

[8] McConnell v. Brillhart, 17 Ill. 354; Whelan v. Sullivan, 102 Mass. 204; Johnson v. Buck, 35 N. J. L. 338.

[9] Nichols v. Johnson, 10 Conn.

tinctly set forth;[10] that the subject-matter be stated or described with convenient certainty;[11] and that the parties be named or fully identified.[12] In other words, that all the essential terms and conditions of the contract shall be expressed with such reasonable certainty that the whole agreement of the parties may be ascertained from the memorandum without any aid from parol testimony.[13] Where these particulars satisfactorily appear the manner in which they are stated makes but little difference; for the numerous cases which have arisen in every state in the Union involving the construction of the statute of frauds, and in which the principles which must control in such construction have been discussed, all unite in formulating the rule that no formal language is required,[14] and that anything from which the intention may be gathered, as in other contracts, will be sufficient; and that any kind of writing, from a solemn deed to mere hasty notes or memoranda in books, letters or papers, provided they contain upon their face or by reference to other writings the essential matters just mentioned, will constitute a sufficient compliance with the statute and take the contract out of its operation.[15]

192; Abeel v. Radcliff, 13 John. (N. Y.) 279; McGuire v. Stevens, 42 Miss. 724.

[10] Davis v. Shields, 26 Wend. (N. Y.) 341; Anderson v. Harold, 10 Ohio, 399; Phillips v. Adams, 70 Ala. 373; Gault v. Stormont, 51 Mich. 636; Jenkins v. Harrison, 66 Ala. 345; Ide v. Stanton, 15 Vt. 685.

[11] Waterman v. Meigs, 4 Cush. (Mass.) 497; O'Donnell v. Leaman, 43 Me. 158; Johnson v. Kellogg, 7 Heisk. (Tenn.) 262; Smith v. Stanton, 15 Vt. 685.

[12] Webster v. Ela, 5 N. H. 540; Eppich v. Clifford, 6 Col. 493.

[13] Williams v. Robinson, 73 Me. 186; Kopp v. Reiter, 146 Ill. 473.

[14] McConnell v. Brillhart, 17 Ill. 354.

[15] Wood v. Davis, 82 Ill. 311; Barry v. Coombe, 1 Pet. (U. S.) 640; McFarson's Appeal, 11 Pa. St. 503; Ewins v. Gordon, 49 N. H. 444. An instrument which contains all the essentials of a complete contract may be treated as such, although in form it purports to be merely a receipt. Schweitzer v. Connor, 57 Wis. 177. Where a party desiring to purchase land applies to the agent of the owner and makes an offer definite as to price, terms, etc., and the agent submits the offer to his principal by letter, and afterwards writes to the purchaser that the owner has accepted the offer, and the agent sends to the principal a deed to be executed by him in accordance with the terms of such offer, which deed is executed by the principal and returned to the agent, and the purchaser, upon receiving the letter notifying him that his offer is ac-

A substantial difference exists in some states between the original phraseology of the statute and subsequent re-enactments. Thus, while the original provision required the memorandum to be signed by the person to be charged, subsequent enactments, in some instances, require it to be "subscribed by the party by whom the sale is to be made."[16] Under such a statute the rulings are much more strict and arbitrary than under the statute in its original form. An express and distinct agreement in writing subscribed by the vendor or his agent is, in such a case, an absolute necessity, and a contract signed by the vendee only has no effect or validity,[17] notwithstanding he may be the person to be charged.

§ 88. **The signature.** The only important formal requisite mentioned by the statute is that the evidence of the contract shall be signed by the person to be charged therewith or his agent thereunto lawfully authorized. This, however, is imperative; and it is not enough that the note or memorandum of the agreement is in the handwriting of such party, so long as his name does not appear as a signature.[18] But just what is to be regarded as a signature is not always a matter of easy determination. In the earlier cases it has, in many instances, been held that the manner or place of signing is immaterial, provided the name is inserted with the intention of giving assent and for the purpose of completing or closing the contract.[19] Hence, a contract commencing, "I, John

cepted, goes to the agent to close up the transaction, and the agent then refuses to consummate the trade, these facts constitute a valid contract, not within the statute, for a breach of which the purchaser can maintain a suit for damages against the owner of the land. Wood v. Davis, 82 Ill. 311.

[16] This is the language of the New York statute.

[17] Davis v. Shields, 26 Wend. (N. Y.) 341; Champlin v. Parrish, 11 Paige (N. Y.), 406. Thus, a written agreement subscribed by the owner of land, authorizing a real estate broker to sell it upon certain terms therein specifically stated, and an agreement to purchase the property upon these terms subscribed by a purchaser, subsequently written across the face of the paper while unrevoked in the hands of the broker, do not, taken either separately or together, form a contract for the sale of the land binding upon the owner. Haydock v. Stow, 40 N. Y. 363.

[18] Champlin v. Parrish, 11 Paige (N. Y.), 405; Henry v. Colby, 3 Brews. (Pa.) 171; Anderson v. Harold, 10 Ohio, 399; Wade v. Newbern, 77 N. C. 460.

[19] Clason v. Bailey, 14 Johns. (N. Y.) 484; Hawkins v. Chace, 19 Pick. (Mass.) 502; Anderson v.

Smith," etc., but without subscription of any kind, was held to be sufficiently signed.[20] Undoubtedly, when the name so written is intended for a signature and to give authenticity to the instrument, courts, in furtherance of the ascertained intention of the parties, will give effect to it as such;[21] but the later and better rule would seem to be, that names in the body of an instrument are not equivalent to signature where there has been no subscription,[22] for usually they must of necessity be so introduced to make the instrument intelligible;[23] while in every document drawn with any degree of formality the *testatum* clause discloses an intention to place the signature at the end if to be appended at all.[24]

A signature, ordinarily, is considered as consisting of a party's name, or the term or appellation by which he is known and identified in society. It may, however, be a full name or simple initials,[25] or even a mark,[26] provided it

Harold, 10 Ohio, 399; Fulshear v. Randon, 18 Tex. 275.

[20] See Barry v. Coombe, 1 Pet. (U. S.) 640; Penniman v. Hartshorn, 13 Mass. 87; Hawkins v. Chace, 19 Pick. (Mass.) 502. "But it may be questioned," observes Mr. Browne, "whether this is justified by the authorities. Where instruments commencing in the first person have been taken to be well signed, without subsequent subscription, they generally appear to have been so attached, or accompanied by acts of the party so clearly showing that he regarded the instrument as complete as to repel the presumption of an intention to make a further execution." Browne Stat. Frauds, § 357. And it would seem that in cases of instruments commencing in the third person, as "Mr. A. B. agrees," etc., such a presumption does not arise. Id. And see Adams v. Field, 21 Vt. 256; Allen v. Everitt, 12 B. Mon. (Ky.) 371; Armstrong v. Armstrong, 29 Ala. 538.

[21] Barry v. Coombe, 1 Pet. (U. S.) 640; McConnell v. Brillhart, 17 Ill. 354; Clason v. Bailey, 14 Johns. (N. Y.) 484; Penniman v. Hartshorn, 13 Mass. 87. This method seems to be good at common law; see 2 Kent's Com. 511; 1 Dart Vend. (6th ed.) 270. But in every instance, when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent. Matter of Booth, 127 N. Y. 109.

[22] Thomas v. Caldwell, 50 Ill. 138; Hawkins v. Chace, 19 Pick. (Mass.) 502; Wise v. Ray, 3 Iowa, 430; McMillen v. Terrell, 23 Ind. 163.

[23] Matter of Booth, 127 N. Y. 109.

[24] Thomas v. Caldwell, 50 Ill. 138.

[25] Sanborn v. Flagler, 9 Allen

serves the purpose of identification and at the same time shows intent. Nor is it material in what manner the signature is appended; for it makes no difference, so far as the signer's liability is concerned, whether he writes his name in script or roman letters, or whether such letters are made with a pen or with type, or whether he has printed, engraved, photographed or lithographed it, so long as he adopts the signature as his own.[27]

Another point in this connection, which does not seem to have arisen in this country, or at least has not been brought to the attention of the writer, consists in the character of the signature; that is, the style which the signer assumes. As previously remarked, a man's signature is generally considered to be his name; yet he may sign by a mark, and formerly employed only a device by way of seal, which was considered a sufficient signing. Thus, if a letter is signed "your father," or "your brother" without other words of identification, is this a signing within the meaning of the law? The English cases would imply that it is not, and that a paper so attested will not constitute a binding agreement on the part of the person so attesting. It is held that it is not enough that the party be identified, and that there may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name;[28] yet it is difficult to perceive why such a subscription, evidently intended to identify the person of the writer and authenticate the paper in exactly the same manner as the written name, does not satisfy the requirement of the statute when it creates no ambiguity.

A misplaced signature may usually be explained by parol testimony, as where a party by mistake signs in the place designated for witnesses. It would seem from the early English cases that in matters of this kind little or no discretion was permitted in construction; and Lord Eldon is

(Mass.), 474; Palmer v. Stevens, 1 Denio (N. Y.), 471; State v. Bell, 16 N. C. 313.

[26] Jackson v. Van Dusen, 5 Johns. (N. Y.) 144.

[27] Weston v. Meyers, 33 Ill. 424.

[28] See Selby v. Selby, 3 Meriv. (Eng. Ch.) 2.

reported as saying, "where a party or principal or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal."[29] The correctness of this remark has been questioned in later English decisions, while the general tendency of the American cases has been to permit the introduction of parol evidence to show intent. Undoubtedly it is important that the signature, and also the seal, of an instrument should be in the usual place; yet the mere place of either the signature or the sealing is not conclusive as to the intent with which they are made.[30]

§ 89. **Signature of one party only sufficient.** Mutuality is an indispensable ingredient of every contract; and hence, unless both parties are so bound by the agreement that each may enforce it against the other, it can have no operative effect either at law or in equity. But, while this principle is indisputable, it by no means follows that a contract bearing the signature of one party only is incapable of enforcement for this reason. The statute itself only requires that the memorandum shall be "signed by the party to be charged therewith;" and this signature is prescribed rather as a necessary evidence of the contract than as an essential or constituent part of the engagement itself. Even if we concede that mutuality must exist at the time the agreement is entered into, the lack of one signature would not indicate anything to the contrary, but only shows that both parties have not been equally vigilant in obtaining the legal written evidence to prove it. But it is now well settled by authority that mutuality of remedy existing at the time action is brought is all that is required to sustain the contract or confer jurisdiction;[31] and the signature of one party only will be sufficient, provided it be the one against whom enforcement is sought.[32]

[29] Coles v. Trecothick, 9 Ves. (Eng.) 251.

[30] Richardson v. Boynton, 12 Allen (Mass.), 138; Warren v. Chapman, 115 Mass. 586; and see Reed v. Drake, 7 Wend. (N. Y.) 345.

[31] Dresel v. Jordan, 104 Mass. 412; Thayer v. Luce, 22 Ohio St. 62; Gartrell v. Stafford, 12 Neb. 552; Estes v. Furlong, 59 Ill. 302; Louber v. Connit, 36 Wis. 176. Where there is a bill for specific performance in a court of equity the exhibition of the bill makes the complainant chargeable as on a memorandum of the contract signed by him, and this renders the remedy mutual between the parties at the time when the action is commenced. Ives v. Hazard, 4 R. I. 14.

[32] Thayer v. Luce, 22 Ohio St.

The only object of the statute is to compel the production of written evidence of the terms of the contract against the party sought to be charged thereon, and its only design is to prevent perjury and subornation of perjury by refusing the aid of the law in the enforcement of any rights claimed under it against him without such written evidence. Therefore, the end and object of the statute is attained by written proof of the obligation of the defendant in an action to enforce; he is the party to be charged with a liability dependent on and resulting from the evidence, and he is intended to be protected against the dangers of false oral testimony.[33]

Specific performance of a unilateral contract may always be decreed, if it is just, fair and reasonable, and the party sought to be charged has so bound himself as to meet the requirements of the statute, and the other party has elected to treat the contract as binding and to enforce it,[34] and in such event an offer contained in a bill brought for specific performance is sufficient to charge the plaintiff and to create a strict mutuality.[35]

When it is considered that it is not the agreement which is required to be in writing, and that the agreement in fact is made before any writing is had, and that the agreement and the memorandum subsequently made to evidence it are not the same, the reason of the law becomes apparent.

§ 90. **Signature by agent.** By the first and third[36] sections of the statute of frauds, as originally adopted, the writing is required to be signed by the parties to the agreement, or their agents authorized by writing; but the memoranda required by the fourth and seventeenth sections omit this latter requisite, and the note is sufficient if signed by an agent duly authorized. In the re-enactment of the statute by the states

62; Gartrell v. Stafford, 12 Neb. 552; Louber v. Connit, 36 Wis. 176; Estes v. Furlong, 59 Ill. 302; Penniman v. Hartshorn, 13 Mass. 87; Ivory v. Murphy, 36 Mo. 534; Ide v. Stanton, 15 Vt. 687; McFarson's Appeal, 11 Pa. St. 503; Newby v. Rogers, 40 Ind. 9; Ives v. Hazard, 4 R. I. 14; De Cordova v. Smith, 9 Tex. 129.

[33] Justice v. Lang, 42 N. Y. 493; Ballou v. Sherwood, 32 Neb. 666; Ide v. Leiser, 10 Mont. 5; Miller v. Cameron, 45 N. J. Eq. 95.

[34] Ross v. Parks, 93 Ala. 153; Peevey v. Haughton, 72 Miss. 918.

[35] Ives v. Hazard, 4 R. I. 14; Peevey v. Haughton, 72 Miss. 918.

[36] Relating to leases, etc.

the language of the original has in the main been closely followed, and the authorization of the agent is not ordinarily required to be in writing in agreements for the sale of lands.[37] A distinction seems to have been made in this particular between agreements by which an interest is intended to be actually passed and such as simply contemplate a conveyance of such interest by other and future documents. Hence, while the agreement must be in writing, yet if executed by a person under and in pursuance of a delegation of authority, such authority need not be so evidenced; and if the agent has, in fact, been authorized to sign in behalf of his principal, and does so sign, the principal will be bound by the act.[38]

Nor does it seem necessary, where the memorandum is signed by an agent, that the name of the principal should appear. It is well settled that an undisclosed principal may sue or be sued upon a contract made in the name of his agent,[39] and it has been held that the provisions of the statute are complied with if the names of competent contracting parties appear in the writing. In such event the weight of authority sustains the proposition that the fact of agency may be shown so as to give the benefit of the contract on the one hand and charge with liability on the other, the unnamed principal.[40]

§ 91. **Signature by corporation.** It is a well-established rule, governing the admissibility of extrinsic evidence to show who are the parties to be bound by a written instrument, that a party will not be permitted to show by oral testimony that his written agreement, understandingly entered into, was not in fact to be binding on him. So it has been generally held,

[37] In a few of the states the rule is otherwise, and the agent's authority must be in writing. See Kozel v. Dearlove, 144 Ill. 23; Alabama etc. R. R. Co. v. South etc. R. R. Co. 84 Ala. 570; Toan v. Pline, 60 Mich. 385.

[38] Shaw v. Nudd, 8 Pick. (Mass.) 9; Champlin v. Parrish, 11 Paige (N. Y.), 405; Blood v. Hardy, 15 Me. 61; Gowen v. Klous, 101 Mass. 454; Malone v. McCullough, 15 Col. 460; Jackson v. Murray, 5 T. B. Mon. (Ky.) 184; Curtis v. Blair, 26 Miss. 309; Worrall v. Munn, 5 N. Y. 229.

[39] Thayer v. Luce, 22 Ohio St. 62; Dykers v. Townsend, 24 N. Y. 57; Hunter v. Giddings, 97 Mass. 41; Tainter v. Lombard, 53 Me. 371.

[40] Kingsley v. Siebrecht, 92 Me. 23; Eastern R. R. Co. v. Benedict, 5 Gray (Mass.), 561; Powell v. Wade, 109 Ala. 95; Waddill v. Sebree, 88 Va. 1012; Conway v. Sweeney, 24 W. Va. 643.

where individuals have assumed obligations over their own signatures, that, notwithstanding the addition of descriptive words denoting some official trust or corporate dignity, parol evidence is inadmissible to show that it was the intention to make the instrument the obligation of the corporation which they represented, and not that of the parties executing it.[41] The question has generally arisen in the case of promissory notes and obligations of like character, but the principle is not confined in its application. Where a corporation is one of the contracting parties, such corporation, and not its managers, directors or trustees, should assume the obligations of the contract; and the name of the corporation should appear as one of the parties, both in the body of the contract and in the signature.[42] A proper and safe mode of executing a corporate contract is for the officers or agents who may act in the premises to subscribe the name of the corporation, followed by their own official signatures, with apt words to show the procuration.[43]

§ 92. **The contracting parties.** Inasmuch as no contract can be made without parties competent to contract, so it naturally follows that no contract can be enforced unless the parties are named or designated; and, as parol evidence is inadmissible to supply the terms or cure the defects of a written agreement, the parties form the first inquiry in considering a memorandum of sale. It is of vital importance, therefore, that the memorandum should show who are the parties, either by direct designation or by reference sufficient to fully identify them;[44] for, even though properly signed by the party to be charged, if it nowhere appears who the opposite party is,[45] or if though a party be named he is not with certainty

[41] Nixon v. Downey, 49 Iowa, 166; Baldwin v. Leonard, 39 Vt. 266.

[42] Thus, where a note was made by parties under the style of "We, the trustees of the Methodist Episcopal Church in Lebanon," etc., and signed and sealed by the several persons composing such trustees, *held*, that the note was individual, and parol proof could not be received to vary it. Hypes v. Griffin, 89 Ill. 134.

[43] Gillett v. Bank, 7 Ill. App. 499.

[44] Nichols v. Johnson, 10 Conn. 192; Webster v. Ela, 5 N. H. 540; Brown v. Whipple, 58 N. H. 229; Farwell v. Lowther, 18 Ill. 252; Grafton v. Cummings, 99 U. S. 100; Gowen v. Klous, 101 Mass. 449; Thornton v. Kelly, 11 R. I. 498.

[45] A memorandum which does

identified, the writing will be insufficient to support an action brought upon it.[46] In like manner, if both parties are named, yet by such ambiguous insertion that it is impossible to ascertain which of the parties is vendor and which vendee, the instrument will be without effect.[47]

§ 93. **The terms.** It is an invariable rule that every agreement which the law requires to be in writing must be certain in itself, or capable of being made so by reference to other writings.[48] Form, as we have seen, is unimportant, provided the purport of the undertaking is unmistakably expressed; and any note or memorandum which furnishes evidence of a complete and practicable agreement is sufficient to meet the requirements of the statute.[49] Parol evidence may be received to explain latent ambiguities or to apply the instrument to the subject-matter;[50] but the essential terms can only be ascertained from the writing itself, and cannot be supplied by parol.[51] Were the rule otherwise it would at once introduce all the mischiefs which the statute was designed to prevent. It is necessary, therefore, that all the terms be definitely settled and the contract concluded; for if any material part still rests in treaty, or remains to be settled by further negotiation,

not name or describe the vendor is fatally defective. Mentz v. Newwitter, 122 N. Y. 491.

[46] Osborn v. Phelps, 19 Conn. 63; Sherburne v. Shaw, 1 N. H. 157. This question is very thoroughly and learnedly reviewed in Grafton v. Cummings, 99 U. S. 100.

[47] Bailey v. Ogden, 3 Johns. (N. Y.) 399. But in case of sales of chattels the late tendency of courts is to permit the admission of parol evidence as an aid to interpretation.

[48] Abeel v. Radcliff, 13 Johns. (N. Y.) 279; Nichols v. Johnson, 10 Conn. 192; Boardman v. Spooner, 13 Allen (Mass.), 353; James v. Muir, 33 Mich. 223; Tice v. Freeman, 30 Minn. 389; Norris v. Blair, 39 Ind. 90; Buck v. Pickwell, 27 Vt. 167; Massey v. Hackett, 12 La. Ann. 54; Webster v. Ela, 5 N. H. 540.

[49] Williams v. Morris, 95 U. S. 444; Hurley v. Brown, 98 Mass. 545.

[50] Barry v. Coombe, 1 Pet. (U. S.) 640; Clark v. Burnham, 2 Story (C. Ct.), 1; Tice v. Freeman, 30 Minn. 389; Baldwin v. Shannon, 43 N. J. L. 596; Lovejoy v. Lovett, 124 Mass. 270.

[51] Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467; Brown v. Whipple, 58 N. H. 229; Ridgway v. Ingram, 50 Ind. 145; O'Donnell v. Leeman, 43 Me. 160; Morton v. Dean, 13 Met. (Mass.) 385; Elliot v. Barrett, 144 Mass. 256; Kopp v. Reiter, 146 Ill. 437. An action was brought upon the following, which was signed by both parties: "This certifies that

or if any of the terms cannot be ascertained under the rule first stated, the contract, for all practical purposes, is a nullity and incapable of specific enforcement.[52] If the instrument is couched in language so vague as to be incapable of being understood the same result will follow, for a legal promise must mean something distinct and definite—something capable of being understood and of being carried into effect.

§ 94. **The consideration.** It is as true concerning agreements in respect to sales of land as of other commercial transactions, that no binding contract can exist unless based upon a sufficient consideration. Yet, notwithstanding the consideration forms an essential and material part of the contract, it is not necessary, as a rule, that it should be expressed in the memorandum; for it is a general principle, applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language employed is, in judgment of law, contained in them. Hence, if the agreement be so stated that a consideration may be implied or inferred, it is as

I *have sold*" to the plaintiff "about five acres of land, more or less, being the same which I bought of him, in consideration of the same sum which I paid him for the same, with interest from the time I purchased the same till I paid for it (supposed about six months), with the expense of the deed; also the taxes for one year." It was held that this was a valid contract for sale. Atwood v. Cobb, 16 Pick. (Mass.) 227. A writing ran thus: "Augest the 20 1850 i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of now for the labor he don for me overage, and this shall be his wrecept for all my writes and claim against the land. (Signed) David Phillips." *Held*, an agreement to convey sufficient for equity to execute, and not within the statute. Phillips v. Swank, 120 Pa. St. 76.

[52] McGuire v. Stevens, 42 Miss. 724; Telegraph Co. v. Telegraph Co. 39 N. J. Eq. 160. If parties negotiating for the sale of a tract of land agree in writing upon a specified price per acre, but that the vendor shall take in payment a house and lot of the vendee, at cash value, to be pronounced by two persons (not naming them), or the money, by certain instalments, in case the vendee shall prefer paying the money, and afterward (the vendee not having elected to pay money for the land) the parties, by indorsement on the writing, appoint two persons to value the house and lot, who attempt to do so but differ in opinion, whereupon they verbally agree to make another appointment at some other time not specified, the contract is too incomplete to be enforced in a court of equity. Baker v. Glass, 6 Munf. (Va.) 212.

effectual as if expressly appearing on its face.[53] Indeed, a contract to convey land upon payment of the stipulated price is in itself evidence of a mutual agreement of the vendor to sell and the vendee to purchase; and the agreement of one party forms a sufficient consideration for that of the other.[54] Such consideration is ample for all purposes, provided the promises are concurrent and obligatory upon both parties at the same time.[55] It does not seem, however, that it is essential that both promises should be obligatory when the contract is entered into in order to render the mutual promise a sufficient consideration and it is no objection that one of the parties had no power to enforce the contract at the time it was made. It is sufficient if the unbound party subsequently renders himself chargeable by a written and signed offer of performance.[56]

Nor is it necessary that the consideration for the contract should have reference to money or even to pecuniary values; it may consist of anything deemed meritorious or valuable by the parties.[57] Thus, marriage is a sufficient consideration to support a conveyance of land,[58] and may properly form the basis of an agreement concerning the same. So, also, the adjustment of a controversy honestly inaugurated, in respect to property interests, is a sufficient consideration to support an agreement concerning the subject-matter of such controversy.[59] Considerations which are given for compromising

[53] Adkins v. Watson, 12 Tex. 199; Hargraves v. Cook, 15 Ga. 321; Rogers v. Kneeland, 10 Wend. (N. Y.) 252; Douglass v. Howland, 24 Wend. (N. Y.) 35; Goward v. Waters, 98 Mass. 596; Sage v. Wilcox, 6 Conn. 81; Reed v. Evans, 17 Ohio, 128. This has been so held even where the statute provides for some "note or memorandum, *expressing the consideration*." See Eno v. Woodworth, 4 N. Y. 249.

[54] Ewins v. Gordon, 49 N. H. 444; Vassault v. Edwards, 43 Cal. 458; Murphy v. Rooney, 45 Cal. 78; Pool v. Docker, 92 Ill. 501.

[55] Lester v. Jewett, 12 Barb. (N. Y.) 502.

[56] As when the unbound party brings an action for performance against the party originally charged. See Ives v. Hazard, 4 R. I. 14; Evans v. Williamson, 79 N. C. 86; Vassault v. Edwards, 43 Cal. 458; Ivory v. Murphy, 36 Mo. 534; Roberts v. Griswold, 35 Vt. 496.

[57] Charleston etc. R. R. Co. v. Leech, 33 S. C. 175.

[58] Otis v. Spencer, 102 Ill. 622.

[59] As where a testator devised the larger portion of his estate to a part of his children, leaving the

doubtful rights and settling boundaries are held to be good;[60] and generally a prejudice to the party to whom a promise is made, as well as a benefit to the party making it, is a sufficient consideration to render the promise obligatory.[61]

It is almost the universal practice, however, in all formally drawn agreements, to insert a nominal consideration, usually the sum of one dollar. As a matter of fact, this sum is rarely ever paid, but the acknowledgment of its receipt amounts to an estoppel; and a valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to sustain a promise and take the case out of the operation of the statute.[62]

§ 95. **The purchase price.** It must be understood, however, that the remarks of the foregoing section have reference only to the consideration or motive of the contract and not to the purchase price to be paid for the land; for a price, either fixed by the parties,[63] or capable of being ascertained by computation from some specific facts,[64] or by the appraisal of some person referred to in the memorandum,[65] is an essential element of every contract of sale.[66] A memorandum which, while professing to give the right to purchase, yet names no price or terms, is too imperfect to be treated as a valid con-

others but a small portion, and the latter filed a bill in chancery to set aside the will in order to compel an equal distribution of the property, an agreement between all the heirs, pending the litigation, for an equal distribution of the estate, and in adjustment of the controversy in respect to the will, was held to be based upon a sufficient consideration. Pool v. Docker, 92 Ill. 501.

[60] Zane v. Zane, 6 Munf. (Va.) 406; Moore v. Fitzwater, 2 Rand. (Va.) 442.

[61] Overstreet v. Phillips, 1 Litt. (Ky.) 120; Charleston etc. R. R. Co. v. Leech, 33 S. C. 175.

[62] Lawrence v. McCalmont, 2 How. (U. S.) 426.

[63] Sales v. Hickman, 20 Pa. St. 180.

[64] Atwood v. Cobb, 16 Pick. (Mass.) 227. An agreement to sell land for "about" $700, and a sum sufficient to reimburse the vendor for expenses incurred in a suit then pending concerning said land, *held* sufficiently definite as to consideration to be specifically enforced. Wilbourn v. Bishop, 62 Miss. 341.

[65] Brown v. Bellows, 4 Pick. (Mass.) 178.

[66] Kleinpeter v. Hannigan, 21 La. Ann. 196; Eppich v. Clifford, 6 Col. 493; Spangler v. Danforth, 65 Ill. 152; Grace v. Dennison, 114 Mass. 16; Huff v. Shepard, 58 Mo. 242; Phelps v. Stillings, 60 N. H. 505; Grafton v. Cummings, 99 U. S. 100. Indeed, this necessarily follows from the rule providing that every agreement which is re-

tract;[67] and unless some part of the purchase money has been paid and the purchaser let into possession,[68] the contract would practically be void for all purposes.[69] If it appears from the agreement that the price has already been paid, the reason of the rule does not apply, and no price need be stated.[70]

An exact statement of price in numerals expressive of the denominations of money is not necessary, but some unequivocal and positive method of ascertaining the price must be agreed upon where the sale purports to be made for a pecuniary consideration.[71] It is not necessary, however, that the price should be paid in money; it may consist of anything deemed by the parties to be of value.[72]

§ 96. Description of the property. It is a familiar rule in this branch of the law that a contract which equity will specifically enforce must be certain in its terms, and the certainty required has reference both to the description of the

quired to be in writing by the statute of frauds must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained. Abeel v. Radcliff, 13 Johns. (N. Y.) 297.

[67] Sales v. Hickman, 20 Pa. St. 180; Williams v. Morris, 95 U. S. 444; Parkhurst v. Van Courtland, 1 Johns. Ch. (N. Y.) 273; Phelps v. Stillings, 60 N. H. 505; Phillips v. Adams, 70 Ala. 373.

[68] Temple v. Johnson, 71 Ill. 13. Such a contract would be void, even though the purchaser had been placed in possession, where no part of the purchase money had been paid. Phillips v. Adams, 70 Ala. 373.

[69] Carr v. Building Co. 19 N. J. Eq. 424. But see Ellis v. Bray, 79 Mo. 227. A writing in form: "Yates Center, Ks., June 13, 1883. Received of J. B. Fry $50, for part payment of purchase money for Sec. 1, T. 25, R. 14, Woodson county, Ks. (Signed) T. M. Eads, agent for Alex. Platt," *held* too indefinite for a memorandum under the statute of frauds. Fry v. Platt, 32 Kan. 62.

[70] Holman v. Bank of Norfolk, 12 Ala. 369.

[71] Thus, a contract for the sale of a village lot at whatever price the first lot sold in the vicinity should realize was held not to be void for uncertainty, an adjacent lot having been sold for $125 before the action was commenced on said contract. Cunningham v. Brown, 44 Wis. 72. The defendant agreed that the plaintiff should "have the refusal of a farm bought by me for the sum of $1,940, upon his complying with certain conditions, which conditions he has complied with." This was held to be a valid contract, and that it expressed the price for the land. Bird v. Richardson, 8 Pick. (Mass.) 252.

[72] Charleston etc. R. R. Co. v. Leech, 33 S. C. 175.

property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, will invalidate the contract.[73] But while an unequivocal description, giving location, area and boundaries, is a literal and perfect observance of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification,[74] as by reference to extrinsic facts or other instruments[75] by means of which the land can be ascertained with sufficient certainty.[76] Where the description does not identify the land, nor state directly where it is, nor indicate any extrinsic fact from which its locality can be ascertained and fixed, specific performance cannot be decreed, nor can parol evidence be received to fix the locality.[77]

§ 97. **The interest to be conveyed.** The memorandum required by the statute of frauds to maintain an action on a contract for the sale of any interest in land must clearly show, either by itself or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is.[78] The estate, as well as the land, must be shown, unless by necessary legal implication the interest is the entire right of property in the bargained premises. A memorandum which does not show whether it relates to an estate in fee, for life or for years has, even under recent decisions, been held insufficient;[79] but as the statute in most of the states now provides that in the sale of land, where no

[73] Whelan v. Sullivan, 102 Mass. 204; Peters v. Phillips, 19 Tex. 74; Tice v. Freeman, 30 Minn. 389; Ridgway v. Ingram, 50 Ind. 145; Cortelyon's Appeal, 102 Pa. St. 576.

[74] White v. Hermann, 51 Ill. 243; Haven v. Richardson, 5 N. H. 113; Brown v. Bellows, 4 Pick. (Mass.) 179; Kay v. Curd, 6 B. Mon. (Ky.) 100.

[75] Washburn v. Fletcher, 42 Wis. 152; Tallman v. Franklin, 14 N. Y. 589; Norris v. Blair, 39 Ind. 70.

[76] Ryers v. Wheeler, 22 Wend. (N. Y.) 148; Worthington v. Hylyer, 4 Mass. 196; Warrington v. Ayres, 40 N. Y. 357; McGuire v. Stevens, 42 Miss. 724; Johnson v. Craig, 21 Ark. 533; Taylor v. Ashley, 15 Tex. 50; Ridgway v. Ingram, 50 Ind. 145; Jordan v. Fay, 40 Me. 130; Ferris v. Irving, 28 Cal. 645.

[77] Ryan v. Davis, 5 Mont. 505; Bishop v. Fletcher, 48 Mich. 555; Tice v. Freeman, 30 Minn. 389; Meyer v. Mitchell, 75 Ala. 475; Jones v. Carver, 59 Tex. 293; Sherer v. Trowbridge, 135 Mass. 500.

[78] Farwell v. Mather, 10 Allen (Mass.), 322.

[79] Farwell v. Mather, 10 Allen (Mass.), 322; and see Abeel v. Radcliff, 13 Johns. (N. Y.) 297; Morton v. Dean, 13 Metc. (Mass.) 385.

specific estate is mentioned, the interest conveyed shall be taken to be the fee, this branch of the question has lost much of its importance. It is customary in stipulating for the conveyance that the land shall be conveyed by good and sufficient deed in fee-simple; but the neglect to add this description of the character of the estate would not probably affect the contract where the statutory provision above referred to is in force, and the intention of the parties was that the purchaser should take the fee.

§ 98. **Time.** Although it is a fundamental principle that time is a primary and indispensable element in all contracts, and at law is a controlling incident, yet, in contemplation of equity, in contracts relating to land, it is not considered as necessarily of their essence.[80] It may be made essential by an express stipulation of the parties,[81] or it may be deemed so from the nature of the property or the purpose for which it was purchased,[82] or from other circumstances surrounding the case;[83] but, as a general proposition, where there is nothing in the contract attaching any particular importance to the time of performance, time will not usually be considered material.[84]

Where parties intend to make time of the essence of the contract, to have that effect in equity the stipulation must be clearly and unequivocally expressed. The intention must be unmistakably apparent from the language employed; and when such language leaves no room for doubt, and the contract is one which the parties are competent to make, it will take effect according to its terms, and be binding in equity as well as at law.[85] To accomplish this, form is not material provided substance is found, and usually any language will

[80] Milnor v. Willard, 34 Ill. 38; King v. Ruckman, 20 N. J. Eq. 316; Prince v. Griffin, 27 Iowa, 514.

[81] Mason v. Payne, 47 Mo. 517; Kirby v. Harrison, 2 Ohio St. 326; Knott v. Stephens, 5 Oreg. 235; Reynolds v. R. R. Co. 11 Neb. 186; Barnard v. Lee, 97 Mass. 92; Kimball v. Tooke, 70 Ill. 553.

[82] Jones v. Robbins, 29 Me. 351.

[83] Hoyt v. Tuxbury, 70 Ill. 331; Grigg v. Landis, 21 N. J. Eq. 494; Furlong v. Barnes, 8 R. I. 226; Hutcheson v. McNutt, 1 Ohio, 18.

[84] Murphy v. Lockwood, 21 Ill. 611; Glover v. Fisher, 11 Ill. 666; Steele v. Branch, 40 Cal. 3.

[85] Scott v. Fields, 7 Ohio, 424; Phelps v. R. R. Co. 63 Ill. 468; Prince v. Griffin, 27 Iowa, 514; Grey v. Tubbs, 43 Cal. 359; Morgan v. Bergen, 3 Neb. 209; Snider v. Lehnherr, 5 Oreg. 385.

be sufficient which clearly provides that the contract shall be void in case of the non-fulfillment of the prescribed conditions.[86] Merely naming the time of performance, even with the stipulation last stated, will not impart essential character where it clearly appears that such stipulation was simply formal,[87] and such contract will be held to mean only that completion shall be made within a reasonable time and substantially according to the agreement, regard being had to all the circumstances;[88] but if the language employed expressly states that time is of the essence,[89] or if it otherwise appear that both parties intended to fix a time for completing the contract and this was to be literally complied with, neither party, in the absence of other circumstances, can obtain relief from the consequences of default.

As constituting one of the terms the time of performance should be stated; and as the rule is imperative that a contract cannot rest partly in writing and partly in parol, it necessarily follows that parol evidence is not admissible to fix the time when a written contract is to be performed. Hence, there are numerous cases which hold that specific enforcement cannot be decreed when the contract fixes no time for performance;[90] as where the memorandum states the purchase price but omits the time of payment.[91] It might, it would seem, be urged that, reasoning by analogy, payment should be made within a reasonable time; yet this, it is contended, would only be to introduce the forbidden element of uncertainty; for no rule has ever been devised to fix the limits of a reasonable time, nor is there any known or recognized custom to fix what is thus left undetermined. It is believed, however, that this is a rather extreme view; for ordinarily, where no time is expressed in a contract for the performance of its terms, the law will imply that it shall be within a reasonable time,[92] the circumstances of each particular case fur-

[86] Kimball v. Tooke, 70 Ill. 553.

[87] Barnard v. Lee, 97 Mass. 92; Jones v. Robbins, 29 Me. 351.

[88] Jones v. Robbins, 29 Me. 351; Waterman v. Dutton, 6 Wis. 265.

[89] Missouri, etc. R. R. Co. v. Brickley, 21 Kan. 275; Stow v. Russell, 36 Ill. 18.

[90] Gault v. Stormont, 51 Mich. 636; Gates v. Gamble, 53 Mich. 346; Wright v. Weeks, 25 N. Y. 153; Johnson v. Kellogg, 7 Heisk. (Tenn.) 262.

[91] Gault v. Stormont, 51 Mich. 636.

[92] Driver v. Ford, 90 Ill. 595; Hamilton v. Scully, 118 Ill. 192; Waterman v. Dutton, 6 Wis. 265.

nishing the basis for determining what is a reasonable time.[93] This doctrine finds its most numerous illustrations in contracts connected with chattels, but it seems it is equally applicable to contracts for the sale and purchase of land.[94]

§ 99. **Receipts.** As previously stated, it is immaterial what form the writing which constitutes the agreement may assume, provided it contains the essential elements of a valid contract so as to satisfy the requirements of the statute of frauds. Hence, a receipt for purchase money, specifying the terms of the agreement and signed by the vendor, will create a binding contract which may be enforced in equity against him.[95] And generally, receipts, letters and other matters in writing, though neither are of themselves sufficient, may, when taken together, constitute such a memorandum as will satisfy the statute.[96]

§ 100. **Letters.** No more common method exists for the negotiation of sales of real estate than through the media of epistolary correspondence, and numerous examples are afforded in the reported cases of binding and valid contracts effected in this manner. Where there is a distinct offer of sale, specifying terms and property, and the offer is at once closed by an unqualified acceptance, the contract is complete and capable of legal enforcement.[97] Such a contract, so made,

[93] Within a month, there being no special circumstances. Lowe v. Harwood, 139 Mass. 133.

[94] See Lowe v. Harwood, 139 Mass. 133.

[95] Raubitschek v. Blank, 80 N. Y. 478. The following memorandum in writing, viz.: "Denver, Dec. 17, 1880. Received of E. the sum of twenty-five dollars, part payment for lots 1, 2, 3, in block 28, C. & E. addition to Denver. Consideration, $2,000. (Signed) M. C., by G. & Co., Agents,"—is sufficient to take the contract out of the statute of frauds, and the contract imported by said memorandum will be specifically enforced. Eppich v. Clifford, 6 Colo. 493. A memorandum in form: "$20. Lincoln, Neb., May 12, 1880. Received of A. B. twenty dollars as forfeit to guaranty the payment of the balance of the first instalment of interest within 30 days from date with interest at 10 per cent. per annum on E. ½ of S. W. ¼, S. 29, T. 9, R. 9, E., at $9 per acre, 10 years' credit. C. D.,"—*held* sufficient under the statute of frauds. McWilliams v. Lawless, 15 Neb. 131.

[96] Peay v. Seigler, 48 S. C. 496; Lee v. Butler, 167 Mass. 426.

[97] Matteson v. Scofield, 27 Wis. 671; Knight v. Cooley, 34 Iowa, 218; Thames L. & T. Co. v. Beville, 100 Ind. 309; Otis v. Payne, 86 Tenn. 663; Wills v. Ross, 77 Ind. 1; Eads v. Carondelet, 42 Mo. 113.

embodies all the essential features necessary to give validity, and in its operation would differ from none made by personal communication or couched in more formal language.[98]

It is essential, however, that all the terms shall be capable of ascertainment from the correspondence to enable a court to enforce specific performance as a whole. Hence, if there are essential elements affecting the rights of the parties which are not implied by or to be inferred from what they have agreed upon, but left open for future consideration and adjustment, the contract as a whole lacks completeness, and no action can arise upon it.[99] Again, the intention of a present contract should appear; for while men may and do contract by letter, and such contracts are always upheld and enforced, it is, nevertheless, a method that courts are ever inclined to scrutinize closely and construe liberally. In many instances such letters are intended merely as preliminary negotiation. Proposals are made and views exchanged; prices are discussed, and suggestions offered relative to the property under consideration. From all this a strict construction might possibly deduce a contract within the meaning of the statute of frauds, and yet such might not have been the actual intent of the parties. The question, therefore, in such cases always is: Did the parties mean to contract by their correspondence, or were they only settling the terms of an agreement into which they formally proposed to enter after all its particulars had been adjusted, and by which alone they intended to be bound?[1] If upon this view it appears that the letters were merely the basis for a contract, or if it is reasonably doubtful whether what passed was only treaty, no action

[98] Hickey v. Dole, 66 N. H. 336; Urann v. Coates, 109 Mass. 581; Kingsbury v. Burnside, 58 Ill. 310; Austin v. Davis, 128 Ind. 472.

[99] Brown v. R. R. Co. 44 N. Y. 79; Gates v. Nelles, 62 Mich. 444. Where a contract is made between parties residing at a distance from each other by means of letters passing between them, it is the duty of the court, the letters and the acts of the parties being proven, to determine their legal effect, and whether they constituted a contract, and if so to give construction to the contract; and it is error to submit the construction of such contract to the jury. Ranney v. Higby, 5 Wis. 62.

[1] Lyman v. Robinson, 14 Allen (Mass.), 242; Carter v. Shorter, 57 Ala. 253; Knight v. Cooley, 34 Iowa, 218; Moulton v. Kershaw, 17 Rep. 606.

can be maintained on them.[2] This is particularly true if the party attempting to enforce the contract has done nothing under it.[3]

But where the essential requisites appear, and no doubt can exist as to intention, the contract becomes complete when the answer containing the acceptance of a distinct proposition is dispatched, whether by mail or otherwise;[4] provided, however, that it be done with due diligence after the receipt of the communication containing the proposal, and before any intimation is received that the offer is withdrawn;[5] and provided, further, that the party making the offer was alive when such offer was accepted.[6] This is the rule recognized by all the leading authorities[7] and adopted by the best writers.[8] Nor does this rule at all contravene the primary rule that, to constitute a valid contract, the minds of the parties must meet and their joint assent be manifest; for it is not necessary that their wills should concur at the same moment if the will of the party receiving the proposition is declared before the will of the party making it is revoked. The consent of one party may properly precede the other, provided the will of the party offering continues down to the time of acceptance; and, unless the contrary appears, the presumption is that this will does continue, upon the principle that, wherever the existence of a particular subject-matter or rela-

[2] Errick v. Monette, 75 Ala. 75; Gates v. Nelles, 62 Mich. 444.

[3] Carr v. Duval, 14 Pet. (U. S.) 77; McDonald v. Bewick, 51 Mich. 79.

[4] Trevor v. Wood, 36 N. Y. 307; Washburn v. Fletcher, 42 Wis. 152.

[5] K. and C. had lived sixty miles apart in cities between which was a mail communication twice a day. On January 28th C. wrote to K., asking terms on which K. would sell a parcel of land. K. replied January 30th, stating his terms. K.'s agent did not deliver the letter to C. until February 2d. C. at once had the title examined, and parted with securities to get money to pay for the land. On February 7th, before receiving any notice of K.'s withdrawal of his offer, C. wrote, accepting it and arranging for closing the transaction at once. *Held*, that there was a contract binding on K. Kempner v. Cohn, 47 Ark. 519.

[6] Mactier v. Firth, 6 Wend. (N. Y.) 103; Moore v. Pierson, 6 Iowa, 279.

[7] Wheat v. Cross, 31 Md. 99; Hutcheson v. Blakeman, 3 Met. (Ky.) 80; Ferrier v. Stover, 63 Iowa, 484; Stone v. Harmon, 31 Minn. 512; Trevor v. Wood, 36 N. Y. 307; Averill v. Hedge, 12 Conn. 436; Levy v. Cohn, 4 Ga. 1.

[8] 2 Kent's Com. 477; Story, Sales (4th ed.), § 129.

tion has once been proved, its continuance is presumed until the contrary is shown or until a different presumption is afforded by the subject-matter.[9]

Nor will the fact that the parties each make mention of circumstances remotely connected with the sale, which are to be left for future consideration, affect the contract or render it any the less complete, provided such matters do not partake of its essential terms;[10] but if the reply to an offer restates the terms thereof with some variations, however slight, it cannot be regarded as a completion of the contract.[11] The proposition must be accepted upon the terms stated, and until unqualifiedly accepted it remains a mere offer;[12] on the other

[9] Moore v. Pierson, 6 Iowa, 279; Mactier v. Firth, 6 Wend. (N. Y.) 103. Letters properly directed and mailed are presumed to have been received; and the same is true of telegrams given to a telegraph company for transmission if properly addressed, and the presumption becomes conclusive when not denied. Oregon S. S. Co. v. Otis, 100 N. Y. 446.

[10] Moore v. Pierson, 6 Iowa, 279; Fitzhugh v. Jones, 6 Munf. (Va.) 83. As where in the letter containing the offer there is some mention of debts to be paid, of which the writer says he will speak in another letter, the payment of these debts not being connected with the price to be paid for the land or the terms of payment; or where the letter of acceptance says the acceptor expects to receive some personal property about which there is some dispute with the land, yet gives no intimation of waiving or delaying, for this reason, his acceptance of terms of trade proposed. Moore v. Pierson, 6 Iowa, 279. So, too, where a person disposed to purchase a tract of land wrote to the other inquiring whether it was for sale, and what were his terms by the acre, stating also the payments it would be convenient for him to make, one of which was to pay $1,000 immediately. The answer to this letter stated the price the owner was willing to take, but that he wished the purchaser would take upon himself the responsibility of establishing the lines. He also acceded to the offered terms of payment, and required the purchaser's answer. The purchaser's reply stated that he would take the land on the terms proposed, and would have the lines ascertained, though it went on to express a wish that the owner's agent should attend to the settlement of part of the boundaries, saying nothing, however, of waiving his acceptance of the terms he had proposed. This the court held was a complete contract for the sale of the land. Fitzhugh v. Jones, 6 Munf. (Va.) 83.

[11] An answer to an offer to sell land, which fixes a different place for the delivery of the deed and payment of the purchase money, is not an acceptance. Langellier v. Schafer, 36 Minn. 361; Egger v. Nesbitt, 122 Mo. 667; Northwestern Iron Co. v. Meade, 21 Wis. 474.

[12] Maclay v. Harvey, 90 Ill. 525; Bruner v. Wheaton, 46 Mo. 363;

hand, if an answer to an offer by letter proposes modifications, the party making the offer must state his acceptance of the modifications if he desires to hold the writer of the answer.[13]

It is further to be observed that, where an offer is made by letter, asking for, or where the sender, from the nature of the business, has a right to expect, an answer by return mail, the offer can only endure for a limited time. The making of it, under such circumstances, is accompanied by an implied stipulation that the answer shall be by return mail; and, if that implied stipulation is not satisfied, the person making the offer is released from it.[14] In case nothing is said in regard to acceptance, and there is nothing in the circumstances attending the offer to denote urgency, it remains open for a reasonable time;[15] and parol evidence would, in such case, be admissible to show what would be a reasonable time.[16]

Further, where letters are relied upon, either independently or in connection with other writings, they must upon their face sufficiently demonstrate their reference to the agreement in question without the aid of parol proof,[17] and in this respect come fully within the rule in reference to collateral papers. This applies with particular force to letters written by the person who seeks to enforce the contract; for, not being signed by the person sought to be charged, they do not in themselves constitute a part of the memorandum required by the statute of frauds, and can only be made such by annexation and reference.

In the foregoing paragraphs the subject has been considered with special reference to letters passing between vendor and vendee. It would seem, however, if the memorandum is otherwise sufficient, that it is not necessary that the letters

Kennedy v. Gramling, 33 S. C. 367.

[13] Nundy v. Matthews, 34 Hun (N. Y.), 74. The offer to accept in terms varying from those proposed amounts to a rejection of the offer and the substitution of a counter-proposition which cannot become a contract until assented to by the first proposer. Fox v. Turner, 1 Ill. App. 153.

[14] Maclay v. Harvey, 90 Ill. 525.

[15] Wilson v. Clements, 3 Mass. 1; Martin v. Black, 21 Ala. 721.

[16] But not to show that at the time of making the proposition it was understood that it should remain open for a specific time. Stone v. Harmon, 31 Minn. 512.

[17] Beckwith v. Talbot, 95 U. S. 289.

should have passed between the parties to the contract. Thus, it has been held in a number of cases that the contract may be sufficiently proved by letters written by the vendor to a third party. These decisions announce the doctrine that as the only object of the statute is to prevent perjury in the setting up of contracts by parol evidence, a memorandum is equally corroborative whether it passes between the parties or between one of them and his own agent.[18]

§ 101. **Telegrams.** Telegraphic correspondence communicating an offer, when acted on,[19] forms a contract governing the acts of the parties under the stipulations of the telegrams;[20] and when a contract has been thus made, if unambiguous in its terms, it will not differ in legal effect from other contracts in writing.[21] There must, of course, be a distinct offer on the one hand and an acceptance of it on the other, showing a concurrence of the minds of the parties upon all the terms of the contract, before either party is bound,[22] while all the essential terms must appear either by the telegrams or other papers which can be directly connected with them.[23] A telegraphic message, written, signed and delivered to the telegraph company for transmission, is a sufficient compliance with the statute of frauds and binds the sender,[24] while such message, if properly addressed, will be presumed to have been received in due course, a presumption that becomes conclusive when not denied.[25]

§ 102. **Delivery.** The general principles which govern the operation of written instruments creating obligations or im-

[18] Singleton v. Hill, 91 Wis. 51; Drury v. Young, 58 Md. 546; Lee v. Cherry, 85 Tenn. 707.

[19] A telegram accepting an offer, if sent within the time agreed upon, completes the contract. The time of telegraphing is the time when the contract was closed. Perry v. Iron Co. 15 R. I. 380.

[20] Duble v. Batts, 38 Tex. 312; Eggers v. Nesbit, 122 Mo. 667.

[21] Wells v. R. R. Co. 30 Wis. 605.

[22] Deshon v. Fosdick, 1 Woods (C. Ct.), 286.

[23] A telegram from a principal, saying he would take certain property for the purchase of which his agent had negotiated, was *held* not a sufficient memorandum to satisfy the statute of frauds where it did not express the terms of the contract, but these would have to be ascertained from the oral negotiations between the agent and the vendor. McElroy v. Buck, 35 Mich. 434.

[24] Hawley v. Whipple, 48 N. H. 487.

[25] Oregon S. S. Co. v. Otis, 100 N. Y. 446.

posing duties and burdens apply with equal force to contracts for the sale or conveyance of land. The delivery of a written contract is indispensable to its binding effect, and proof of same is as necessary as of execution. Nor is a delivery conclusively proved by merely showing the placing of the paper by one of the alleged contracting parties in the hands of the other. Delivery is in all cases a question of intent, and depends on whether the parties at the time meant it to be a delivery to take effect presently.[26] This subject is very fully considered in that part of the work which treats of the conveyance, to which the reader is referred.

§ 103. **Continued — Undelivered Deeds.** When, in pursuance of a parol contract, a deed has been drawn and executed, but for any reason remains in the hands of the vendor or his agent undelivered, such deed cannot be regarded as a "note or memorandum" within the meaning of the statute, unless it is shown that it contains the terms of the agreement and conditions of sale.[27] Such, at least, is the reasonable inference to be drawn from the adjudicated cases, though it must be confessed that a perusal of same leaves the question in some doubt. In those cases which seem to sustain the doctrine that an executed but undelivered deed may be resorted to and that same will furnish a sufficient memorandum of the contract of sale under the statute, the terms of

[26] Jordan v. Davis, 108 Ill. 336; Cocks v. Barker, 49 N. Y. 107. Parties negotiated for the purchase by defendant and sale by plaintiff of certain lands. They agreed upon the price, and a contract was drawn and signed in duplicate, to which P. attached his name as a witness. While the papers lay upon the table defendant inquired as to the papers in respect to title. Plaintiff replied that he had none. Defendant then suggested that, before proceeding further, the matter should be submitted to his counsel for approval, which was assented to by plaintiff. Counsel being absent, the contracts were left with a clerk, together with a check for first payment, with directions to deliver them if the counsel approved them. Plaintiff subsequently obtained one of the duplicates from the clerk. Upon return of counsel he disapproved the title, and rejected it as defective. In an action for specific performance, *held* that the facts justified a finding that no contract was concluded; that all the acts of the parties were to be regarded as parts of one transaction, which was never consummated, and that there had been no delivery. Dietz v. Farish, 79 N. Y. 520.

[27] Cagger v. Lansing, 43 N. Y. 550; Campbell v. Thomas, 42 Wis. 437; Dwain v. Burnette, 89 Cal.

the original contract seem generally to have been recited or the deeds to have been connected with some antecedent agreement. In such cases the undelivered deeds have been resorted to for the purpose of supplying omissions or inaccuracies upon the principle that they constituted but part of a single transaction.[28]

It has been held also, that a deed drawn and executed with the knowledge of both parties, with a view to the consummation of the contract, and which embodies the substance though not all of the details or particulars of the agreement

564; Freeland v. Charmley, 80 Ind. 132; Overman v. Kerr, 17 Iowa, 485.

[28] Thus, in Jenkins v. Harrison, 66 Ala. 345, a memorandum in writing, purporting to contain the terms of a contract for the sale of land, and signed by both of the parties, failed to describe the property with the certainty and definiteness, required to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards, which did correctly describe the land; and it was held that such undelivered deeds, and the memorandum signed by the parties, might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum . . . is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum, but they were all executed as parts of a single transaction, between the same parties, having reference to the same subject-matter." In Work v. Cowhick, 81 Ill. 317, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land, and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchased by Elizabeth Worth this day at administrator's sale," were left with a third person to be held until the purchaser should obtain personal security on the note, and execute a mortgage, at which time the deed was to be delivered. It was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction, and that together they constituted such proof as amounted to a compliance with the statute of frauds; the description in the deed indicating what land was referred to by the imperfect description in the note. So, in Wood v. Davis, 82 Ill. 311, written authority to an agent to sell land, and the terms of a contract of sale were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact delivered, and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser

for sale, is a "note or memorandum" sufficient to satisfy the statute.[29]

The general and better rule, however, seems to be that an undelivered deed is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds, and that it cannot be resorted to for the purpose of aiding the statute by mere implication.[30]

against the owner, it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that, although the memoranda contained no description of the land, the description in the undelivered deed could be referred to to supply the defect.

[29] Johnston v. Jones, 85 Ala. 286.

[30] Kopp v. Reiter, 146 Ill. 437; Cannon v. Cannon, 26 N. J. Eq. 316; Johnson v. Brook, 31 Miss. 17.

CHAPTER IV.

CONSTRUCTION OF LAND CONTRACTS.

§ 104. General principles.
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§ 104. General principles. The obligation of a contract is the legal duty of performing it according to its terms. There can be no legal duty without a remedy or means of enforcing it; for without such remedy a contract is a mere imperfect obligation, depending for its performance upon the will of him from whom performance is expected. Parties, therefore, who enter into contracts must be considered as looking to the municipal law for a remedy to enforce them; and this law, thus in the legal contemplation of the parties, enters into and forms a part of the obligation.[1] It may be further stated as

[1] Lessley v. Phipps, 49 Miss. 790; Miller v. Wilson, 146 Ill. 523; Edwards v. Kearzly, 96 U. S. 595. Where there is a conflict of applicatory laws, the parties to an agreement are presumed to have made it

a fundamental proposition in the application of the principles last enunciated, that all matters bearing upon the execution, interpretation and validity of a contract are to be determined by the law of the place where it is made; that all matters connected with its performance are regulated by the law prevailing at the place of such performance; and that all matters respecting the remedies incident to it depend upon the law of the place where the suit is brought.[2]

It is a further proposition that all contracts must receive a reasonable interpretation according to the intention of the parties at the time of executing them, if that intention can be gathered from the language which they have employed,[3] and that such intention is in all cases the controlling principle, requiring the adoption of such construction as shall carry the same into effect whenever this can be done consistently with the established rules of law.[4] The acts to be performed under the contract and the manner of performance may also be considered,[5] as well as the acts leading to or done at the time of execution or with reference thereto; and those facts in view of the existence of which the contract was entered into may be considered in construing a clause thereof the meaning of

with reference to that statute which is most favorable to its validity and performance. Talbot v. Trans. Co., 41 Iowa 247.

[2] Scudder v. Union Nat. Bank, 91 U. S. 406; Morgan v. R. R. Co., 2 Woods (C. Ct.) 244. Generally a contract which is valid in the state in which it was made should be enforced in another state, unless it is clearly contrary to good morals or repugnant to the policy or positive institutions of that state. Phinney v. Baldwin, 16 Ill. 108; Robinson v. Queen, 87 Tenn. 445. Where a contract made in one place contemplates the execution of deeds or other contracts, making payments or doing other legal acts in another place, the law of the place where the acts are to be done will govern the contract; and the obligation of such contract will bind the contracting party to do all such legal acts as are necessary according to the law of the place where they are to operate, so that they may have their full legal effect. Carnegie v. Morison, 2 Met. (Mass.) 381. Contracts in relation to land must be made in conformity to the local laws. And such local laws must also be resorted to for the purpose of determining what is to be considered real property. Chapman v. Robertson, 6 Paige (N. Y.) 627.

[3] Crabtree v. Hagenbaugh, 25 Ill. 233; Goosey v. Goosey, 48 Miss. 210; Barlow v. Scott, 24 N. Y. 40.

[4] Atwood v. Cobb, 16 Pick. (Mass.) 227; Hurley v. Brown, 98 Mass. 545; Ives v. Hazzard, 4 R. I. 29; Stout v. Whitney, 12 Ill. 218; Coey v. Lehman, 79 Ill. 173.

[5] People v. Gosper, 3 Neb. 285;

which is obscure,[6] while the whole contract should always be considered in determining the meaning of any of its parts.[7] But where the contract bears such inherent evidence of its true meaning that it carries a clear legal conviction, evidence of the intention of the parties as furnished by other sources or of surrounding circumstances is properly excluded.[8]

A contract should be construed so as not to give either party an unfair or unreasonable advantage over the other, unless such was the manifest intention of the parties at the time it was made; for it is one of the cherished objects of the law to maintain a reciprocity between parties to a contract whenever it can be done without doing violence to the language used.[9]

To the end that effect may be given to the intent of the parties in the interpretation of their contracts, courts may consider the circumstances of their situation and the subject-matter of their meeting,[10] as well as any practical interpretation of the agreement which they may have given to it by their acts;[11] and where a written contract has been fully performed within its apparent intent and reasonable requirements, and to the evident satisfaction of the parties at the time, and it is not made to appear that there was any mutual error arising from mistake of fact, or any practicing of fraud, courts should not interfere.[12]

§ 105. **When construction is for the court.** It is a general and well-established rule that, where the terms of a contract are undisputed, the question as to the nature, extent and effect thereof and of the interests of the parties thereto is to

Dunn v. Moore, 16 Ill. 151; Pollard v. Maddox, 28 Ala. 321; Sumner v. Williams, 8 Mass. 162.

[6] Stapenhorst v. Wolff, 35 N. Y. Sup. Ct. 25; Parmelee v. Hambleton, 24 Ill. 605; Strong v. Gregory, 19 Ala. 146.

[7] People v. Gosper, 3 Neb. 285; Goosey v. Goosey, 48 Miss. 210.

[8] Morss v. Salisbury, 48 N. Y. 636; Coey v. Lehman, 79 Ill. 173; Watrous v. McKie, 54 Tex. 65.

[9] Gale v. Dean, 20 Ill. 320.

[10] Conwell v. Pumphrey, 9 Ind. 135; Robinson v. Fiske, 25 Me. 401; Lacey v. Green, 84 Pa. St. 514; Pollard v. Maddox, 28 Ala. 321.

[11] Williamson v. McHatton, 16 La. Ann. 196; Chicago v. Sheldon, 9 Wall. (U. S.) 50.

[12] Lathers v. Keogh, 109 N. Y. 583; Casey v. Pennoyer, 6 La. Ann. 766; Farley v. Pettes, 5 Mo. App. 262. The practical construction in such cases is held to control as being in the nature of an estoppel. Citizens' Ins. Co. v. Doll, 37 Md. 89.

be determined from the contract, and is a question of law for the court, whose duty it is in every instance, where meaning or effect is called in question, to declare its legal interpretation.[13] The rule is the same whatever be the character of the instrument,[14] and has been held to extend even to the correct reading of words as well as to their meaning and legal effect.[15] It seems, however, that although it is the special province of the court to construe and determine the nature and character of documentary evidence, which should not for this purpose be submitted to the jury,[16] yet if it is so submitted, and the jury construe it aright, the verdict will be allowed to stand and the submission will furnish no ground for exception.[17]

§ 106. When for the jury. While it is true, as a general rule, that the interpretation of written instruments properly belongs to the court, whose province it is to construe contracts, and not to the jury, yet there are many cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties.[18] Thus, where the instrument contains terms or words used in a sense peculiar to some art or business, the determination of the sense in which such terms or words are employed may be properly left to the jury.[19] In like manner, if the writing is obscure or ambig-

[13] Williams v. Waters, 36 Ga. 454; Kidd v. Cromwell, 17 Ala. 648; Andrews v. Telford, 37 Iowa 314; Fowle v. Biglow, 10 Mass. 379; McKenzie v. Sykes, 47 Mich. 294; Groat v. Gile, 51 N. Y. 431.

[14] Lowry v. Megee, 52 Ind. 107; Nash v. Drisco, 51 Me. 417; Seaward v. Malatte, 15 Cal. 304; Montag v. Lynn, 23 Ill. 551.

[15] Lapeer Ins. Co. v. Doyle, 30 Mich. 159. But this is hardly in consonance with the volume of authority, and is rather an invasion of the province of the jury.

[16] Warner v. Miltenberger, 21 Md. 264; Woodman v. Chesley, 39 Me. 45; Morse v. Weymouth, 28 Vt. 825.

[17] Martineau v. Steele, 14 Wis. 272.

[18] Brown v. McGrau, 14 Pet. (U. S.) 493; Jennings v. Sherwood, 8 Conn. 122; Bank v. Dana, 79 N. Y. 108.

[19] Goddard v. Foster, 17 Wall. (U. S.) 123; Williams v. Woods, 16 Md. 220; Eaton v. Smith, 20 Pick. (Mass.) 156; Prather v. Ross, 17 Ind. 495; Sellars v. Johnson, 65 N. C. 104; McAvoy v. Long, 13 Ill. 147.

uous, when such obscurity or ambiguity arises from unfamiliar words or terms, or from indistinct chirography, or erasures, and, in some instances, where the meaning of the contract depends upon facts *aliunde,* in connection with the written language, it should go to the jury to ascertain and determine the intention.[20]

§ 107. **Intention of the parties.** The primary inquiry in the interpretation of a contract is directed to the intention of the parties thereto at the time of its execution; and the cardinal rule applicable to the same is that such intention, so far as it can be ascertained, must govern.[21] Where the contract is clear and unambiguous in its terms, it is the best evidence of such intention; and even though the parties may have failed to express their real intention there is no room for construction, and the legal effect of the agreement must be enforced according to the plain import of the language employed.[22] If the language is ambiguous courts uniformly endeavor to ascertain the true meaning, and to adopt such a construction as will give effect to the provisions which carry out the evident intent.[23] Facts existing at the time of the making of an obscurely-worded contract are available to explain the language used;[24] and courts may look to the circumstances attending the contracting parties, as well as to the terms of the contract itself, to learn the purposes and objects contemplated thereby, as aids to a correct understanding of a particular part, supposed to be equivocal or doubtful,[25] but the verbal language employed by the parties in

[20] Holland v. Long, 57 Ga. 36; Paine v. Ringold, 43 Mich. 341; Bank v. Dana, 79 N. Y. 108.

[21] Higgins v. Wasgatt, 34 Me. 305; Belmont v. Cowan, 22 N. Y. 438; Field v. Leiter, 118 Ill. 17; Bent v. Rogers, 137 Mass. 192; Waterman v. Andrews, 14 R. I. 589; Bryan v. Bradley, 16 Conn. 474; Pike v. Monroe, 36 Me. 309; Mills v. Catlin, 22 Vt. 98.

[22] Walker v. Tucker, 70 Ill. 527; Babb v. Bancroft, 13 Kan. 123; Brannan v. Messick, 10 Cal. 95; Jackson v. Blodgett, 16 Johns. (N. Y.) 172; Green v. Day, 34 Iowa 328; Ker v. Evershed, 41 La. Ann. 15.

[23] People v. Gosper, 3 Neb. 285; Walker v. Tucker, 70 Ill. 527; Steele v. Branch, 40 Cal. 3.

[24] Dent v. North American, etc., Co., 49 N. Y. 390; Strong v. Gregory, 19 Ala. 146; Robinson v. Fiske, 25 Me. 401; Lacey v. Green, 84 Pa. St. 514.

[25] Pratt v. Canton Cotton Co. 51 Miss. 470; Lacy v. Green, 84 Pa. St. 514; Kuecken v. Valtz, 110 Ill. 265.

making the contract cannot be resorted to, nor will their understanding as to the conditions and effect of their written contract be received to affect its construction.[26] The construction of a contract does not depend upon what either party thought, but upon what both have agreed.[27]

It has been held, however, that, while the understanding of the parties as to the conditions and effect of their contract cannot be received to affect its construction, their understanding of the meaning of terms employed in it may be shown;[28] and a party to the same will usually be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract.[29]

The intention is further to be ascertained rather from the order of time in which the acts are to be done than from the structure of the instrument or the arrangement of the covenants.[30]

§ 108. Construction deduced from acts. While the rule still holds that, where parties reduce their contracts to writing, they must be governed by its provisions, and their intention must be gathered from its terms; yet this applies in its strict sense only where the intention is apparent. It will frequently happen, through inadvertence or other reason, that the language employed does not fully disclose the true intent, and resort is necessarily had to acts to supplement the written

[26] Dent v. North American, etc., Co., 49 N. Y. 390; Haddock v. Woods, 46 Iowa 433; Watrous v. McKie, 54 Tex. 65.

[27] Brunhila v. Freeman, 77 N. C. 128; Clark v. Lillie, 39 Vt. 405; Watrous v. McKie, 54 Tex. 65.

[28] Thus, evidence may be received that by "current funds" the parties meant money. Haddock v. Woods, 46 Iowa 433; and see Barlow v. Scott, 24 N. Y. 40.

[29] Clinton County v. Ramsey, 20 Ill. App. 577; Wells v. Carpenter, 65 Ill. 447; Barlow v. Scott, 24 N. Y. 40; Gunnison v. Bancroft, 11 Vt. 490.

[30] As when a day is fixed for the payment of money and the day is to happen on the performance of that which is the consideration of it, no action can be maintained before performance. Dunn v. Moore, 16 Ill. 151. On the other hand, if a day be appointed for the payment of money or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. Sheern v. Moses, 84 Ill. 448.

words. Hence the construction given to a contract by the parties themselves, as shown by their acts under it, may be resorted to as a means of determining the true intention which they had in view in entering into the same.[31] As, although an agreement for conveyance of "ten acres out of one hundred and sixty acres" might be void for uncertainty, yet where the vendee has gone into possession and the parties have given a construction to their contract by the manner in which they have executed it, the objection of uncertainty in description would be removed;[32] and the fact that the parties have adopted a particular construction, and have acted upon it, should lead a court without hesitation to adopt that construction as the proper one.[33]

§ 109. When construction should favor either party. As previously remarked, a contract should be so construed as not to give either party an unfair or unreasonable advantage over the other, the object of the law being to maintain as far as possible an entire reciprocity between them. But if a contract contains ambiguous words, or words of doubtful construction, they should, as a rule, be construed most strongly against the party who executed the same, as the other party is not presumed to have chosen the expression of doubtful meaning.[34] For this reason, where the language of a deed permits two constructions, that one should be adopted which is least favorable to the grantor;[35] and the same rule would apply to his contracts for conveyance.

In every instance where a party takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, he should have a construction given to the instrument most favorable to himself.[36] This rule,

[31] Leavers v. Cleary, 75 Ill. 349; Parmelee v. Hambleton, 24 Ill. 605; Nickerson v. R. R. Co., 17 Fed. Rep. 408; Hutchins v. Dixon, 11 Md. 29; Jakeway v. Barrett, 38 Vt. 316; Pate v. French, 122 Ind. 10; O'Dea v. Winona, 41 Minn. 424; Cobb v. McElroy, 79 Iowa 603.

[32] Purinton v. R. R. Co., 46 Ill. 297.

[33] Nickerson v. R. R. Co., 17 Fed. Rep. 408; and see Chicago v. Sheldon, 9 Wall. (U. S.) 50; Frigerio v. Stillman, 17 La. Ann. 23.

[34] Livingstone v. Arrington, 28 Ala. 424; Noonan v. Bradley, 9 Wall. (U. S.) 394; Massie v. Beford, 68 Ill. 290; Richardson v. People, 85 Ill. 495; Gilbert v. James, 86 N. C. 244.

[35] Hager v. Spect, 52 Cal. 579; Mills v. Catlin, 22 Vt. 98; Winslow v. Patten, 34 Me. 25.

[36] Noonan v. Bradley, 9 Wall. (U.

however, is one of last resort, and should be applied only where the instrument is couched in such language as to admit equally of two or more interpretations.[37]

§ 110. **Entire and separable contracts.** It does not appear that any precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject-matter of the contract. When the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item, the contract will generally be held to be severable.[38] Usually the question is regarded as a matter of intention, to be discovered in each case by a view of the language employed and the circumstances attending the subject-matter.[39]

The consideration to be paid, and not the subject or matter to be performed, is usually the test for determining whether a contract is entire or severable; as, if the contract consists of several distinct items founded on a consideration which is apportioned to each item, it is severable. On the other hand, if the contract is for the sale of several distinct things, as for the sale of a town-lot and certain personal property, but all for one consideration, the contract is entire and not divisible, except by the consent of both parties thereto and the making of a new contract.[40]

So, also, a joint contract by two persons for the purchase of land is an entirety, and cannot be repudiated by one without the assent of the other.[41]

§ 111. **Implication.** While necessary implication is as much a part of a written instrument as if that which is so implied was plainly expressed, yet omissions and defects cannot be supplied by virtue of this rule, unless the implication

S.) 394; Livingstone v. Arrington, 28 Ala. 424; Hoover v. Miller, 6 La. Ann. 204; Barney v. Newcomb, 9 Cush. (Mass.) 46.

[37] Falley v. Giles, 29 Ind. 114.

[38] Moore v. Bonnet, 40 Cal. 251; Oil Co. v. Brewer, 66 Pa. St. 351.

[39] Southwell v. Beezley, 5 Ore. 458. A contract for the sale of a parcel of land, "also a tract of coal property," the "coal to be paid for at the rate of half a cent a bushel," *held* on its face to be a divisible contract. Graver v. Scott, 80 Pa. St. 88.

[40] Scheland v. Erpelding, 6 Ore. 258.

[41] Merriman v. Norman, 9 Heisk. (Tenn.) 269.

results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect.[42]

§ 112. Mutual and dependent undertakings. Undertakings are said to be mutual and dependent when each forms the consideration for the other; as, where a party purchases land and gives notes for the purchase money, and the vendor at the same time agrees to convey the land by deed to the purchaser upon the payment of all the notes, the execution and delivery of a deed of conveyance by the vendor and the payment of the last note are mutual and dependent acts. Where acts are mutual and dependent neither party can require the other to proceed until he has performed or offered to perform his part of the contract; nor is either party in default so as to release the other from his part of the agreement.[43] On the other hand, where the covenants or undertakings are independent of each other, one party may maintain an action against the other without averring a performance, or an offer of performance, on his part.[44]

Covenants and undertakings are construed to be dependent or independent, according to the intention of the parties, if that intention can be discovered; but, unless it is clearly made to appear that the intention was that the covenants should be independent, they will be deemed dependent.[45] The intention of the parties as expressed by the language of the contract, and not technical and artificial rules, must govern in deciding whether stipulations are conditional or independent or mutually dependent; while the nature of the transactions, and the order of time in which they are to be performed, may further be considered in arriving at a determination.[46] In a contract relative to the same subject-matter, some stipula-

[42] Hudson Canal Co. v. Coal Co., 8 Wall. (U. S.) 276.

[43] Campbell v. Gittings, 19 Ohio, 347; Jones v. Marsh, 22 Vt. 144; Swan v. Drury, 22 Pick. (Mass.) 485; Bourland v. Sickles, 26 Ill. 497; Sheern v. Moses, 84 Ill. 448; Smith v. Lewis, 26 Conn. 110; Howe v. Huntington, 15 Me. 350. Where agreements were reciprocally entered into for exchange of lands, one conveyance being the consideration of the other, and there was no time fixed for making them, the agreements were held to be mutual and dependent. Couch v. Ingersoll, 2 Pick. (Mass.) 292.

[44] Prairie Farmer Co. v. Taylor, 69 Ill. 440.

[45] Hamilton v. Thrall, 7 Neb. 210.

[46] Howland v. Leach, 11 Pick. (Mass.) 151; Hopkins v. Young, 11 Mass. 302.

tions may be independent, and others dependent and mutually conditional.[47]

§ 113. **Precedent and contemporaneous acts.** Even in the case of mutual and dependent undertakings there must of necessity be some order of precedence, although it may in many cases be hardly appreciable. Thus, the payment of the purchase money and the delivery of the deed are, in most cases, and in the absence of special stipulations, to be deemed mutual and concurrent acts; yet a vendee is not entitled to a deed, unless the contract otherwise provide, until he has made payment,[48] and if the payment of any part of the purchase money is deferred the giving of the deed should precede the delivery of a mortgage to secure the deferred payments.[49] Practically these acts may be contemporaneous; but the rights and liabilities of the parties, whether for specific enforcement or rescission, are usually fixed with regard to this order of precedence.

§ 114. **Admission of parol evidence.** When parties have deliberately put their engagements in writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole agreement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all antecedent verbal propositions and contemporaneous agreements are considered as merged in the writing, from which alone is to be determined the terms and conditions of the contract and the liability of the parties.[50] Parol evidence is inadmissible, therefore, to alter, vary or control such a contract, or to annex thereto a condition or

[47] A contract was made to convey certain land, a part of the consideration of which was to be paid in ten days and a "half of the remainder in twelve months, and the other half in two years, with interest annually, and the deed to be executed at the completing the last payment." It was *held* that the agreement to pay the two first instalments was independent, but that the agreement of the one party to pay the last instalment, and of the other to execute and deliver a deed, were mutually dependent and conditional. Kane v. Hood, 13 Pick. (Mass.) 281.

[48] Terry v. George, 37 Miss. 539; Headley v. Shaw, 39 Ill. 354.

[49] Papin v. Goodrich, 103 Ill. 86.

[50] Merchants' Ins. Co v. Morrison, 62 Ill. 242; Weaver v. Fries, 85 Ill. 356; Walterhouse v. Garrard, 70 Ind. 400; Charles v. Dennis, 42 Wis. 56; Hunt v. Adams, 7 Mass. 518; Curtis v. Wakefield, 15 Pick.

defeasance not appearing on the contract itself;[51] and this rule, established and sustained by innumerable decisions, on account of its importance is never to be relaxed in any degree. The rule itself is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that parties intended a different contract from that expressed in the writing signed by them.[52] Fraud, duress, illegality or other matters affecting the validity of the instrument or the contract thereby evidenced may be shown, and parol evidence is freely and usually necessarily received to demonstrate the same.[53] But with this exception the rule holds absolute; and obligations which parties have deliberately entered into and put in writing, if free from ambiguity or uncertainty, cannot be pared down, taken away or enlarged by parol evidence.[54] The inconvenience that would arise if matters in writing were left to be proved by the uncertain testimony of defective memory is apparent without demonstration; while the dangers that might result, even where parties act in good faith, is abundantly shown in the history of the decided cases where the rule has been invoked and applied.

It has been held that the rule does not apply where it appears from the writing itself that it does not contain the

(Mass.) 437; Williams v. Robinson, 73 Me. 186; Polhill v. Brown, 84 Ga. 338; Bruns v. Schreiber, 43 Minn. 468.

[51] Black v. Bachelder, 120 Mass. 171; Mott v. Richtmeyer, 57 N. Y. 49; Naumburg v. Young, 44 N. J. L. 331; Martin v. Cole, 104 U. S. 30; McDonald v. Elfes, 61 Ind. 279; Richardson v. Johnson, 41 Wis. 100; Rockmore v. Davenport, 14 Tex. 602. And if, in fact, some of the conditions actually made be omitted from the contract, the defendant cannot avail himself of them. Williams v. Robinson, 73 Me. 186. Nor can the contract be varied by parol evidence of lost documents or letters which have passed between the parties before it was executed. Gage v. Phillips, 21 Neb. 150.

[52] Underwood v. Simonds, 12 Met. (Mass.) 275.

[53] Sherman v. Wilder, 106 Mass. 537; Paine v. Upton, 87 N. Y. 327; Barnet v. Abbott, 73 Vt. 120; Friend v. Miller, 52 Kan. 139; Roe v. Kiser, 62 Ark. 92.

[54] Black v. Bachelder, 120 Mass. 171; Knox v. Clifford, 38 Wis. 651; McLellan v. Bank, 24 Me. 566; Holbrook v. Holbrook, 30 Vt. 432.

whole agreement,[55] and that parol evidence is admissible to prove the portion which the parties omitted; and, in like manner, that it does not operate to exclude proof of collateral or superadded agreements, provided the agreements so sought to be proved be not inconsistent with the writing. The admission of parol evidence for these purposes, it is claimed, does not constitute a real exception to the rule, as it is received on the ground that the agreement to which it relates has not been reduced to writing.[56] In ordinary mercantile transactions the principle is undoubtedly correct, or when applied to any contract which, although purporting to be in writing, is not one of the class which the law requires shall be evidenced by a writing. But a contract for the sale of land cannot rest partly in parol and partly in writing;[57] and while parol evidence might be competent to show a total or partial failure of consideration of a contract, or possibly to show a consideration different from that expressed in the writing, it is certain that no proof of contemporaneous agreements can be received or permitted to control, where the effect of such agreements would be to substitute something new or different, or vary or change the operation of the contract as expressed in the writing.[58]

It is to be observed, however, that the rule which forbids the introduction of parol evidence to contradict, add to or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law or by the general policy of the law.[59]

The rules of evidence are substantially the same at law and in equity; and parol evidence which tends to materially alter a written agreement cannot be received in a court of equity any more than in a court of law,[60] except in cases of fraud, mistake, surprise or accident.[61]

[55] Frey v. Vandenhoof, 15 Wis. 397.

[56] Hubbard v. Marshall, 50 Wis. 322; Chapman v. Dobson, 78 N. Y. 74.

[57] McConnell v. Brillhart, 17 Ill. 354; Farwell v. Lowther, 18 Ill. 252.

[58] Gilbert v. Stockman, 76 Wis. 62; Sandage v. Studabaker, etc., Co., 142 Ind. 148.

[59] Martin v. Clarke, 8 R. I. 389.

[60] Dwight v. Pomeroy, 17 Mass. 303; Eveleth v. Wilson, 15 Me. 109; Tilton v. Tilton, 9 N. H. 392; Toomer v. Lucas, 13 Gratt. (Va.)

§ 115. Continued—Collateral matters and conditions. It is presumed that when a written agreement is entered into it contains the whole of the conditions and undertakings of the parties to the contract; and when parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best but the only evidence of the agreement, and courts are not disposed to relax the rule. It has been found to be a wholesome one for all purposes; and where parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative.[62] In some of the states (notably in Pennsylvania)[63] the stringency of this rule has been considerably relaxed, not only with reference to contracts which, while they have been reduced to writing, are not such as the law requires shall be in writing, but also in respect to contracts for the sale of real property. But, even in these states, the general principles first stated are still rigorously adhered to so far as respects the terms in which the writing is couched, and no case goes the length of ruling that parol evidence can be admitted to change the undertaking itself, although it is held that evidence which goes to explain the subject-matter of an agreement is essentially different from that which varies the terms in which a contract is conceived.

It has been held that the rule as stated does not prevent the parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter which induced the execution of the written obligation, or which constitutes a condition on which the performance of the written agreement is to depend.[64] There is nothing incon-

705; Richardson v. Thompson, 1 Humph. (Tenn.) 151.

[61] Quinn v. Roath, 37 Conn. 16; Bradbury v. White, 4 Me. 391; Chambers v. Livermore, 15 Mich. 381; Ryno v. Darby, 20 N. J. Eq. 231; Margraff v. Muir, 57 N. Y. 155.

[62] Bast v. Bank, 101 U. S. 96; Martin v. Berens, 67 Pa. St. 463.

[63] It is extremely difficult to determine when, in Pennsylvania, parol evidence is permissible to explain a written instrument. The courts of that state have gone to great lengths in the matter of the admissibility of parol evidence, and the Pennsylvania decisions upon this subject cannot be said to be in full accord with the decisions of other states, or to truly represent the prevailing doctrine on this subject.

[64] Michels v. Olmstead, 14 Fed.

sistent in this rule with that first stated, and its denial must, in many instances, work great hardship and injustice; and though it finds its most frequent illustrations in contracts relating to chattel property, there is no impropriety in applying it to agreements providing for the sale of land.[65]

Notwithstanding the statute of frauds, it seems to be a generally accepted doctrine that evidence is admissible of parol agreements as to the proceeds of the sale of lands;[66] and this, too, although the contract for the sale of the land was in writing, if the contract was made subject to the agreement.[67]

It would seem, therefore, that parol evidence cannot be admitted to establish a contemporaneous parol agreement to change the effect of a written contract, or in violation of its terms, but may be received to show an oral promise or undertaking, material to the subject-matter of the contract and collateral thereto, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it.[68]

§ 116. Surrounding circumstances and pre-existing relations. While parol evidence is never admissible to vary, contradict or control a written agreement, yet in construing the same it is proper to look at all the circumstances surrounding the transaction, the pre-existing relations of the parties, their knowledge of the subject-matter of the contract, and the state or condition of that subject-matter.[69] To accomplish this parol evidence may be resorted to without any violation of the rule first stated; and proof may be given, by way of explana-

Rep. 219; Bown v. Morange, 108 Pa. St. 69; Welz v. Rhodius, 87 Ind. 1; Galbraith v. McLain, 84 Ill. 379; Harper v. Harper, 57 Ind. 547.

[65] Thus, a written lease of a hotel having been extended, parol evidence was held competent to establish a contemporaneous oral agreement by the lessor, in consideration of the lease, not to engage in a rival business in the same city. Welz v. Rhodius, 87 Ind. 1. And see Remington v. Palmer, 62 N. Y. 31; Carr v. Dooley, 119 Mass. 294.

[66] Trowbridge v. Wetherbee, 11 Allen (Mass.), 361; Sherrill v. Hagan, 92 N. C. 345; Bruce v. Hastings, 41 Vt. 38.

[67] Michael v. Foil, 100 N. C. 178.

[68] See Clinch, etc., Co. v. Willing, 180 Pa. St. 165.

[69] Springsteen v. Samson, 32 N. Y. 706; Matter of N. Y. C. R. R. Co., 49 N. Y. 414; Emery v. Webster, 42 Me. 204; Berridge v. Glassey, 112 Pa. St. 442; Evans v. Griscom, 42 N. J. L. 579; Lee v. Butler, 167 Mass. 426.

tion, to show the situation of the parties, the object in view, or other extrinsic facts bearing on the question of intention, which may suggest a meaning where none was apparent before, or which tend to indicate what construction shall be placed upon the language used when the same is susceptible of more than one interpretation.[70] With the light thus afforded, as well as upon a view of the whole instrument, that construction should be adopted which seems most in accordance with the apparent intent of the parties.[71] But although courts, when necessary, put themselves in possession of all the facts and circumstances connected with the execution of the instrument for the purpose of ascertaining the intention of the parties and explaining any ambiguity arising from extrinsic facts, yet this is never done where the terms of the instrument are clear and unambiguous and there is no doubt as to the identity of the subject-matter to which the instrument relates.[72]

It must further be understood that, while it is proper to solve questions of ambiguity by throwing upon the language used the light of surrounding circumstances, the rule, so far as it can be invoked as a rule, is one of interpretation merely, and does not permit the making of a new contract, or a reformation of it, or a disregard of its terms. It authorizes only a just construction of those terms and a fair inference as to the common understanding of both the contracting parties.[73]

§ 117. **Usage and custom.** It is a fundamental proposition that custom and usage are supposed to enter into and form a part of all contracts where the use or custom prevails in reference to the matter to which the contract relates,[74] and that the contracting parties are not only presumed to be acquainted with such usage, but contract with reference to it.[75] This proposition, however, is usually restricted in its application to mercantile transactions or particular branches of trade,

[70] Chambers v. Falkner, 65 Ala. 448; Fenderson v. Owen, 54 Me. 372; McDonald v. Timber Co., 88 Tenn. 38; Peay v. Seigler, 48 S. C. 496.

[71] Springsteen v. Samson, 32 N. Y. 706; Chambers v. Ringstaff, 69 Ala. 140.

[72] Stettauer v. Hamlin, 97 Ill. 312; Gilbert v. Stockman, 76 Wis. 62.

[73] Clark v. Woodruff, 83 N. Y. 518.

[74] Doane v. Dunham, 79 Ill. 131.

[75] Life Ins. Co. v. Advance Co., 80 Ill. 549.

and can seldom be invoked as an aid in the interpretation of land contracts.

The principle upon which proof of usage is admitted is that it serves to explain and ascertain the intent of the parties upon some point as to which their contract is silent, and as to which there existed a usage so long continued and well known as to raise a fair presumption that it was within the view of the contracting parties when they made their agreement, and that they contracted with reference to and in conformity with such usage, thus explaining the silence or omission of any express provision of the contract itself.[76] But while a custom or usage is sometimes permitted to affect a contract in order to explain or ascertain the intent of the parties, it cannot be introduced in opposition to any principle of general policy, nor if it be inconsistent with the terms of the agreement, or against the established principles of law;[77] and usually, where parties have settled the terms and conditions of a contract by agreement, they will be concluded by it regardless of any usage or custom.[78]

§ 118. **Ambiguities.** A writing is said to be ambiguous when it is capable of two or more inconsistent constructions, or where there is an uncertainty in the meaning of the expressions used. The term does not include mere inaccuracy, however, nor such uncertainty as arises from the use of peculiar words, or of common words used in a peculiar sense, but intends only such words or expressions as would be found of uncertain meaning by persons of competent skill and information.[79] They are classed as *patent,* or those which exist or appear on the face of the writing itself; and *latent,* or those which arise from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible.[80]

It is a general rule that patent ambiguities, or such as arise upon the words of the instrument, cannot be explained or removed by extrinsic evidence;[81] and this rule is usually

[76] Lamb v. Klaus, 30 Wis. 94; Kimball v. Brawner, 47 Mo. 398.

[77] Wilson v. Bauman, 80 Ill. 493.

[78] Corbett v. Underwood, 83 Ill. 324.

[79] 1 Bouv. Law Dict. 118; Wigram on Wills, 174; 1 Greenl. Ev. § 298; Chambers v. Ringstaff, 69 Ala. 140; Palmer v. Abee, 50 Iowa, 429.

[80] 1 Bouv. Law Dict. 118.

[81] Brown v. Brown, 43 N. H. 25;

strictly adhered to in all cases of the construction of written instruments. Latent ambiguities, or those which arise, not upon the words of the instrument considered in themselves, but in their application to the subject-matter, are governed by a somewhat different rule; and extrinsic evidence will in such cases be received, not to vary or change the purport of the instrument, but to afford additional light in interpreting what is there written.[82] A latent ambiguity, it is said, may be assisted by parol evidence, because the ambiguity being raised by parol may fairly be dissolved by the same means.[83] Hence, where any part of the subject-matter of the contract, or the identity of persons, places or documents therein referred to, are uncertain, and the uncertainty is shown by extrinsic matters—that is, where the words of the agreement, although certain in point of grammatical construction and apparently definite, are rendered uncertain or of doubtful application by circumstances which appear *aliunde*—parol evidence of the intention of the parties at the date of the agreement is admissible in order to identify the property, document or other thing or person intended.[84] The subject will be considered in detail in the succeeding paragraphs.

§ 119. **Technical phrases.** In the construction of contracts and agreements relating to land, courts are not so frequently asked to interpret technical expressions or terms of art as in contracts more intimately connected with commercial subjects. Yet it will often happen that very great embarrass-

Pitts v. Brown, 49 Vt. 86; Panton v. Tefft, 22 Ill. 366; McNair v. Toler, 5 Minn. 435; King v. King, 7 Mass. 496; Ayres v. Weed, 16 Conn. 291; Waldron v. Waldron, 45 Mich. 350; Clark v. Lancaster, 36 Md. 196; King v. Fink, 51 Mo. 209; Chambers v. Ringstaff, 69 Ala. 140; Peacher v. Strauss, 47 Miss. 358; Horner v. Stillwell, 35 N. J. L. 307; Lewis v. Day, 53 Iowa 575; Haven v. Brown, 7 Me. 421.

[82] Bergin v. Williams, 138 Mass. 544; Epperson v. Young, 8 Tex. 135; Hughes v. Wilkinson, 76 Ala. 204; Cooper v. Berry, 21 Ga. 526; Pickering v. Pickering, 50 N. H. 349; Berridge v. Glassey, 112 Pa. St. 442.

[83] Storer v. Freeman, 6 Mass. 440; Webster v. Atkinson, 4 N. H. 23; Eveleth v. Wilson, 15 Me. 109; Pritchard v. Hicks, 1 Paige (N. Y.) 270; Brainard v. Cowdrey, 16 Conn. 1.

[84] See Webster v. Blount, 39 Mo. 500; Huntington v. Knox, 7 Cush. (Mass.) 371; Oelrichs v. Ford, 21 Md. 489; Bell v. Woodward, 46 N. H. 315; Wing v. Gray, 36 Vt. 261; Hughes v. Sandal, 25 Tex. 162; Abbott v. Abbott, 51 Me. 575.

ment is experienced in giving answers to such questions as do arise in the proper adjustment of the rights of parties under contracts for the sale of interests in or connected with real property. Thus, by the use of the terms "mines and minerals," a wide field is opened. It may be that the vendor did not intend to include everything embraced in the mineral kingdom as distinguished from what belongs to the animal and vegetable kingdoms; if he did, notwithstanding the grant is only of the mines and minerals, he has parted with the soil itself. But such a construction, in a case similar to that stated, would be inconsistent with and repugnant to the whole tenor of the grant. On the other hand, there exists no more propriety in confining the meaning of the terms used to any one or more of the subordinate divisions of the earth's composition. This is cited as an illustration of what may, and frequently does, occur in loosely-constructed agreements, where technical phrases are carelessly employed to denote matters which should be stated with specific exactness and accuracy of detail.

The general rule is that the intent, when apparent and not repugnant to any rule of law, will control technical terms, and that, upon the view and comparison of the whole instrument, endeavor should be made to give every part of it meaning and effect.[85] If upon such a survey it clearly appears that a technical word or phrase is used in a sense evidently different from its ordinary technical signification, and the sense in which it is used is plainly shown by the general manifestation of intention as disclosed by the entire instrument, courts will usually give to it that construction which the parties clearly intended.[86]

The terms may receive a restricted meaning through interpretation which has been assisted by a survey of the circumstances surrounding the parties, and relating to the subject-matter of the contract at the time when it was made. As to the extent to which parol testimony is admissible in giving an interpretation or a proper definition of the words used no

[85] Parker v. Nichols, 7 Pick. (Mass.) 111; Jackson v. Blodgett, 16 Johns. (N. Y.) 172; Bryan v. Bradley, 16 Conn. 474.

[86] Central Pac. R. R. Co. v. Beal, 47 Cal. 151; Morrison v. Wilson, 30 Cal. 344; Bradshaw v. Bradbury, 64 Mo. 334; Jackson v. Blodgett, 16 Johns. (N. Y.) 172.

positive rule can be laid down. Where a term of art is employed, or a word connected with some department of the natural world, which has become technical and popular in its use among scientific men and men of letters, a court, when called upon to give a construction to such words, may avail itself of parol testimony to ascertain the technical and popular use of the word. But parol testimony is not admissible, under any circumstances, to show that the parties to an instrument in writing under seal placed upon a particular word or phraseology, which controls the whole effect and value of the writing, any limited or definite meaning for the purposes of that particular transaction.

Good conveyancing will strictly exclude ambiguous terms, words, symbols and other expressions of like character; yet, as these matters are constantly employed, courts are frequently called upon to furnish an interpretation of them. Thus, the symbol "etc." is often employed in connection with specific terms of exact and restricted meaning; as where parties make calculations and adjustments of the amounts to be paid with reference to "rents, interest, etc." The use of this sign or term may sometimes present an apparent ambiguity; but where a view of the subject-matter of the agreement and the situation of the parties gives a clear presentation of the evident design and intention of the parties, the use of this symbol would import no other matters of adjustment than those similar in their nature to what were named. Thus, in the example given, the use of the sign "etc." in this way should be deemed to have reference only to such matters as bore some relation to the current of accrued earnings and liabilities of the premises, and which obviously had to be in some way adjusted between seller and purchaser.[87]

§ 120. **Contemporaneous writings.** When two or more written instruments are executed contemporaneously, each relating to the same subject-matter, and the one referring to the other, the presumption is that they evidence but a single contract,[88] and the several instruments should be con-

[87] Lathers v. Keogh, 109 N. Y. 583. *Held*, in this case, that a tax was not analogous.

[88] Byrne v. Marshall, 44 Ala. 355; Canterberry v. Miller, 76 Ill. 355; Pillow v. Brown, 26 Ark. 240; Smith v. Turpin, 20 Ohio St. 478; Babbitt v. Globe Ins. Co., 66 N. C.

strued together in determining the meaning of the parties thereto,[89] and to complete the memorandum required by the statute.[90] This would follow as a matter of course in case of duplicate agreements mutually signed and interchangeably delivered, but the principle has been extended to cover all the writings and papers employed by the parties in conducting their negotiations; and even though some of the writings are unsigned, if it clearly appears that their matter has been recognized and adopted by the parties, they may still be considered with the others and taken as part of the contract.[91] In this event, however, there must be a direct reference to the unsigned writings, so that, in effect, they shall become incorporated into and form a part of the papers bearing the signatures, and the reference must be so clear as to prevent any other paper being substituted for them. Where a writing is thus referred to it may be identified by parol,[92] but a paper to which no reference has been made cannot be introduced to supply a term or cure any other defect.[93]

As a rule, to justify the construction of two separate writings as constituting but one transaction, there must be identity of parties and date.[94] They must appear on their face to have been simultaneous or practically so, and the question of time is usually considered material. This rule is not unyielding, however, and there are cases of separate writings or instruments that may be so construed even though executed at different times. Thus, where there has been a special agreement, and a subsequent agreement is made the effect of which is not to create an absolute independent contract, but simply a modification of the original, to which reference is made, both should be taken together as one instrument and

71; Morss v. Salisbury, 48 N. Y. 636; Stow v. Tifft, 15 Johns. (N. Y.) 458; King v. King, 7 Mass. 499; Doe v. Bernard, 15 Miss. 319; Norton v. Kearney, 10 Wis. 443.

[89] Morss v. Salisbury, 48 N. Y. 636; Rogers v. Kneeland, 10 Wend. (N. Y.) 218; Strong v. Barnes, 11 Vt. 221; Sewall v. Henry, 9 Ala. 24; Stacey v. Randall, 17 Ill. 467; Wallace v. Beauchamp, 15 Tex. 303; Salmon Falls Mfg. Co. v. Portsmouth, 46 N. H. 249; Norton v. Kearney, 10 Wis. 443.

[90] Lee v. Butler, 167 Mass. 426.

[91] Johnston v. Buck, 35 N. J. L. 338.

[92] Beckwith v. Talbot, 95 U. S. 289.

[93] Freeport v. Bartol, 3 Greenl. (Me.) 340; Morton v. Dean, 13 Met. (Mass.) 385; Ridgway v. Ingram, 50 Ind. 145.

[94] Craig v. Wells, 11 N. Y. 315.

be construed according to the intent of the parties as collected from the whole contract.[95]

Nor is it absolutely necessary that the instruments should in terms refer to each other, if in point of fact they are parts of a single transaction. But until it appears that they are such, either from the writings themselves or by competent extrinsic evidence, they cannot be brought within the operation of the rule. That they are made between the same parties and have the same date are significant facts; yet, where there is no reference in either to the other, it is not inferable from these facts alone that they are parts of a single transaction. It may be that the same parties should have several transactions in one day, and of the same general nature, and yet each one should be distinct and wholly independent of the other. It is therefore of vital importance not only that there shall be identity of parties and correspondence of time, but that the writings plainly disclose their relation to the same subject-matter. Where these features do not combine, and the writings do not refer to each other, neither can in any way be made to qualify or affect the legal construction of the other, and parol evidence will be inadmissible to vary or control their legal effect or operation.[96]

§ 121. **Continued—When variant from each other.** Where two instruments, executed by the same parties at the same time and in relation to the same subject-matter, are construed together as a part of the same transaction, one cannot be regarded as more expressive of the intent of the parties than

[95] Van Hagen v. Van Rensselaer, 18 Johns. (N. Y.) 420; Adams v. Hill, 16 Me. 215. Letters from a principal to his agent may afford a "memorandum or note" of a contract of sale effected through the agent, sufficient under the statute of frauds, where the letters refer to and connect with each other, and, taken as a whole, show clearly the fact and terms of such sale, and a sufficient description of the land. Lee v. Cherry, 85 Tenn. 707.

[96] Cornell v. Todd, 2 Denio (N. Y.) 130. It has been held that the general rule that collateral papers adduced to supply the defect of signature of a written agreement under the statute of frauds should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof is subject to some exceptions, and that parol proof, if clear and satisfactory, may be received to identify the agreement referred to in such collateral papers. Beckwith v. Talbot, 95 U. S. 289.

the other. If in respect to any particular clause such instruments vary in their language, the true intent is to be ascertained by an examination of the terms and provisions which are identical in each and the objects and purposes contemplated by the parties thus determined.[97] Particularly is this true where the instruments were intended to be duplicates, and to express the same terms and employ the same language. Both are to be regarded as originals, and each is entitled to equal faith and credit. The want of accuracy in one is not proven by the mere production of the other.

§ 122. **Unintelligible expressions.** It will sometimes happen that, even under the most favorable construction, words and phrases still remain unintelligible; and where no meaning can be given to a word from the connection in which it is used, nor consistently with express provisions, nor upon a full examination of the whole instrument, such word or term may be treated as surplusage and disregarded.[98]

Clerical omissions, when they clearly appear, although by strict construction creating unintelligible or meaningless expressions, are usually disregarded when the general intent is manifest from the whole instrument taken in connection with attendant circumstances or viewed in the light of other transactions of a similar nature.[99]

§ 123. **Printed blanks.** The use of what is popularly termed "printed blanks" is now well-nigh universal, their labor-saving qualities commending them to the indolent and their supposed legal efficacy to the ignorant. To the amateur conveyancer they are a priceless boon, and even the skilled draftsman gladly avails himself of their assistance. Ordinarily, every part of an instrument is entitled to equal consideration, and is to be taken as equally expressive of intention; yet in the construction of this class of writings it is an established rule in the interpretation of the language employed, that greater

[97] Munson v. Osborn, 10 Ill. App. 508; Morss v. Salisbury, 48 N. Y. 636.

[98] Tucker v. Meeks, 2 Sweeny (N. Y.) 736; Decorah v. Kesselmeier, 45 Iowa 166.

[99] Thus, a contract is not invalid because of the omission of the word "dollars" in an offer to sell "forty acres of land for ten per acre," which was accepted, the purchaser agreeing to pay "what you ask—four hundred dollars"—there being no possibility of doubt as to its meaning. N. W. Iron Co. v. Meade, 21 Wis. 474.

weight should be given to the written than to the printed words where they lead different ways and tend to contrary results.[1] The language of printed blanks is easily assumed to be appropriate without careful examination, while the written words more safely and more nearly indicate the intention of the contracting parties; and for this reason where parties, in attempting to reduce their agreement to form, use a blank containing a printed paragraph which is entirely inconsistent with a provision written in the blank, and it appears that by inadvertence the blank as filled is signed without erasing the printed paragraph, the written provision must control and will be taken as expressing the real contract.[2]

§ 124. **Interlineations—Erasures.** Among the many perplexing questions which arise upon the construction of written instruments is that which is raised by the insertion of words interlined upon the face of the writing. It is not necessary, to give validity, that the writing should be regular or in properly-disposed courses; that the lines should be straight, and that every word should find its appropriate place in unbroken continuity of sentences. This is, of course, desirable; and there are not wanting authorities which hold that an interlineation is presumably an unauthorized alteration, and that the burden of proof is upon the party offering the instrument in evidence to show the contrary.[3] On the other hand, there are cases in which interlineations have been held to create conditions exactly the reverse. The true rule, and the one which governs in all such cases, would seem to be this: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting

[1] Clark v. Woodruff, 83 N. Y. 518; Hill v. Miller, 76 N. Y. 32; American Ex. Co. v. Pinckney, 29 Ill. 392.

[2] People v. Dulaney, 96 Ill. 503.

[3] See McAllister v. Avery, 17 Ill. App. 568.

with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of such instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution.[4]

The foregoing remarks on interlines have practically the same application to erasures, substitutions or alterations of any kind. An erasure or other alteration of any material part of an instrument, after execution, avoids it; and it is for the jury to decide whether the alteration was made after delivery.[5] But the construction of deeds is the province of the court, and the materiality of an alteration is a question of construction; hence, whether erasures or alterations are material or not is a question of law to be decided by the court.[6]

§ 125. **Proposals and offers—Options.** A mere proposal or offer, though made in writing and signed by the proponent, creates no obligation on the part of the person making the same, unless accepted by the person to whom the same is made according to its terms. Being made without consideration, and not possessing the essential element of mutuality, the party making an offer has a right to withdraw it any time before the one to whom it is made accepts it;[7] and this, too, notwithstanding a time was named within which the offer might be accepted.[8] The theory of the proceeding is that it is merely a continuing offer which may be retracted at any time. But where the person so proposing allows his

[4] Beaman v. Russell, 20 Vt. 205; Burnham v. Ayer, 35 N. H. 351; Stoner v. Ellis, 6 Ind. 152; Nichols v. Johnson, 10 Conn. 192; Huntington v. Finch & Co., 3 Ohio St. 445; Cox v. Palmer, 3 Fed. Rep. 16. In this case there appeared interlined upon the face of a mortgage the words "block 19," without which the property described could not be located. The interlineation was in the handwriting of the draftsman, who had not, since the time of execution, had the instrument in his possession. *Held*, that the interlineation was made prior to execution.

[5] Vanhorne v. Dorrence, 2 Dall. (C. Ct.) 304.

[6] Steele v. Spencer, 1 Pet. (U. S.) 552.

[7] Conner v. Reneker, 25 S. C. 514; Perkins v. Hadsell, 50 Ill. 216; Richardson v. Hardwick, 106 U. S. 252; Smith v. Reynolds, 3 McCrary (C. Ct.) 157; Coleman v. Applegarth, 68 Md. 21; Gordon v. Darnell, 5 Colo. 304; Bradford v. Foster, 87 Tenn. 8.

[8] School Directors v. Trefethren,

offer to remain open until accepted, it is then too late to recede.[9]

Where, however, the time for acceptance is not limited, the proposition must be accepted within a reasonable time, to be determined by all the circumstances of the case.[10] If the option is given for a valuable consideration, whether adequate or not, it cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the owner, or his assigns with notice, until it expires by its own limitation.[11] But a unilateral contract or offer, in writing, simply giving an option to purchase within a specified time for a given price, is binding only upon the party who signs it, and upon him only for the time stipulated. Time is of the very essence of such an agreement; and when the time limited has expired the contract is at an end, notwithstanding a nominal consideration may have been paid to the owner of the property for the privilege of the option.[12]

There is a marked distinction between an option of sale and a contract for sale, although such distinction is frequently overlooked. If without consideration an option is a mere proposal which may be retracted at any moment; if given for a consideration it amounts to nothing more than a privilege to purchase at a certain price or within a certain time. It is not a sale; it is not even an agreement for a sale; at best it is but a right of election in the party receiving same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell.[13] If based upon a consideration it cannot be extended

10 Ill. App. 127; Smith v. Reynolds, 3 McCrary (C. Ct.) 157; Boston, etc., R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Larmon v. Jordan, 56 Ill. 204.

9 Perkins v. Hadsell, 50 Ill. 216; Boston, etc., R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Ide v. Leiser, 10 Mont. 5; Wall v. Ry. Co., 86 Wis. 48.

10 Larmon v. Jordan, 56 Ill. 204; Hanly v. Watterson, 39 W. Va. 214; Kellow v. Jory, 141 Pa. St. 144.

11 Ross v. Parks, 93 Ala. 153; Johnson v. Trippe, 33 Fed. Rep. 530; Guyer v. Warren, 175 Ill. 328; House v. Jackson, 24 Ore. 89; Linn v. McLean, 80 Ala. 360; Litz v. Goosling, 93 Ky. 185; Bradford v. Foster, 87 Tenn. 4.

12 Coleman v. Applegarth, 68 Md. 21; Barrett v. McAllister, 33 W. Va. 738; Stembridge v. Stembridge, 87 Ky. 91; Vassault v. Edwards, 43 Cal. 458; Borst v. Simpson, 90 Ala. 374; Steele v. Bond, 32 Minn. 14; Bostwick v. Hess, 80 Ill. 138.

13 Guyer v. Warren, 175 Ill. 328; Yerkes v. Richards, 153 Pa. St. 646; Wall v. Ry. Co., 86 Wis. 48.

beyond the time limited without a new consideration, and even though this is attempted and such extension is evidenced by a writing it is still *nudum pactum* and void.[14] Such extension, however, though void as an option, may still constitute a valid continuing offer of sale, which, if accepted before retraction with a tender of performance, will create a contract capable of specific enforcement.[15]

A proposal, to be effective, must be unequivocal and clear. An offer must be fairly deducible from the writing alleged to be a proposal, or from this in connection with other writings; and mere statements, not amounting to an offer or evincing a desire to sell, cannot be construed into a proposal. This is well illustrated in the case of one who writes a land-owner, inquiring the price of his land or the terms upon which he will sell it. If, in response to such letter, the land-owner names a price or even specifies terms, this will not be equivalent to a proposal to sell the land. The mere statement of the price at which property is held cannot be understood as an offer to sell; for the seller may desire to choose the purchaser, and may not be willing to part with his property to any one who offers his price.[16]

§ 126. **Continued—Option in lease.** A covenant in a lease giving the right to purchase the premises on specified terms is a continuing offer to sell, which, when accepted, constitutes a contract of sale. The proposition, unless otherwise qualified, extends through the whole period of the demise, and if the lease is under seal must be regarded as made upon a sufficient consideration, and therefore one from which the vendor is not at liberty to recede.[17] If the lease is not under seal the contract, if strictly interpreted, cannot be said to be mutual. The earlier cases, both in England and America, hold that want of mutuality of obligation and remedy is a bar to specific performance;[18] but modern authorities have

[14] Ide v. Leiser, 10 Mont. 5; Bradford v. Foster, 87 Tenn. 4; De Rutte v. Muldrow, 16 Cal. 505; Gordon v. Darnell, 5 Colo. 304.

[15] Ide v. Leiser, 10 Mont. 5; in this case the general doctrine of options and contracts is very lucidly and learnedly discussed. And see Coleman v. Applegarth, 68 Md. 21.

[16] Knight v. Cooley, 34 Iowa 218.

[17] Willard v. Taylor, 8 Wall. (U. S.) 557; Guyer v. Warren, 175 Ill. 328; O'Brien v. Borland, 166 Mass. 481.

[18] Parkhurst v. Van Cortlandt, 1

narrowed this doctrine down to cases in which there is no other consideration. An optional agreement to convey, without any covenant or obligation to purchase, and without mutuality of remedy, will now be enforced in equity if it is made upon proper consideration or forms part of a lease or other contract between the parties that may be the true consideration for it.[19] Thus, it is said that in taking a lease a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price; and it is to be presumed that the landlord would not agree to such a concession unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity,[20] and the simple reservation of rent is enough.[21] An option given in a lease should, however, comply with the general rules relative to agreements for the sale of land, and if indefinite or uncertain will be insufficient as a ground for specific performance.[22]

An option of this character can be regarded in no higher light than a mere privilege of purchase. It is binding upon the lessor and available by the lessee for the full period of the option. Beyond this it confers no rights on the lessee, creates no estate in him other than that acquired under the lease, and unless accepted expires with his term or by such other limitation as may be placed upon it.[23] It has been held that a lessee with such an option, although the election to purchase rests solely with him, has thereby such an equitable estate

Johns. Ch. (N. Y.) 282; Smith v. McVeigh, 11 N. J. Eq. 239.

[19] Backhouse v. Mohun, 3 Johns. (N. Y.) 434; Hawralty v. Warren, 18 N. J. Eq. 124. Equity will decree specific performance of a covenant in a lease which provides that the lessee shall have the privilege of purchasing for a fixed price on or before the expiration of the term. Hall v. Center, 40 Cal. 63; and see McLaughlin v. Perry, 35 Md. 352.

[20] Hawralty v. Warren, 18 N. J. Eq. 124.

[21] Gustin v. School District, 94 Mich. 502; Hayes v. O'Brien, 149 Ill. 403; Hall v. Center, 40 Cal. 63; House v. Jackson, 24 Ore. 89; Herman v. Babcock, 103 Ind. 461.

[22] Thus, an agreement in a lease that "if the premises are for sale at any time the lessee shall have the refusal of them" is too indefinite to be enforced specifically. Fogg v. Price, 145 Mass. 513.

[23] Bras v. Sheffield, 49 Kan. 702; Gustin v. School District, 49 Mich. 502; Sutherland v. Parkins, 75 Ill. 338.

in the land under the contract of optional purchase as may be transmitted by him,[24] but this view of the relation does not seem to rest on substantial grounds and is opposed to the generally received principles which govern this branch of the law.[25]

§ 127. **Acceptance.** It may be stated generally that an oral acceptance of a mere proposal or offer in writing will not satisfy the requirements of the statute of frauds, which is explicit in its provisions that the entire contract shall be evidenced by or deducible from writings. It is necessary, therefore, to create a valid obligation, that the acceptance shall itself be in writing, and unqualified or without variance of any kind between it and the proposal, so that it shall clearly appear that there has been a full accession on both sides to one and the same set of terms.[26] A conditional acceptance will not create a contract that can be specifically enforced and amounts to a practical rejection of the offer.[27]

But this rule is not without apparent exceptions, and circumstances will sometimes be permitted to operate as an acceptance where fraud might be perpetrated or injustice result from a strict adherence to the rule. Thus, where offers are made or options given for the purchase of land, and certain conditions are imposed upon the party to whom the option is given, as that he shall move upon or improve the property, pay taxes, etc., upon the performance of which the owner agrees to convey on payment of a stipulated price, a valid acceptance may be created by the performance of the conditions so imposed.[28] In such cases the payment of the purchase price is, of course, one of the conditions; and while there is no agreement expressed in the writing by the purchaser to pay such price, the performance of the other conditions annexed and the tender of the purchase money at or within the time stipulated will constitute a sufficient consideration to make the agreement binding upon the vendor.[29] Prior to the acts of acceptance, as the performance of conditions, etc., the

[24] Kerr v. Day, 14 Pa. St. 112.

[25] See Sutherland v. Parkins, 75 Ill. 338.

[26] Lang v. McLaughlin, 14 Minn. 72; Bruner v. Wheaton, 46 Mo. 363.

[27] Egger v. Nesbitt, 122 Mo. 667.

[28] Mix v. Balduc, 78 Ill. 215; Perkins v. Hadsell, 50 Ill. 216.

[29] Mix v. Balduc, 78 Ill. 215.

vendor may withdraw his offer, for up to that time there is no consideration to support the agreement; but if he allows his offer to remain open until the vendee has accepted it by doing all that he is required to do by its terms, it is then too late to recede.[30]

It is sometimes urged, in cases of this kind, as an excuse for non-performance by the vendor, that the vendee, even by entering upon the land, incurs no obligation that the vendor could enforce, and for that reason the agreement is not binding for want of mutuality. This is undoubtedly a true construction of the instrument; but if the vendee does not choose to avail himself of this privilege and does perform all that is necessary to entitle him to the land, it would be inequitable to permit the vendor to refuse compliance with his promise on the ground that the vendee was not bound by contract to do the same. The acts having been induced by the unrevoked promise of the vendor, equity will not permit him to plead want of mutuality or consideration. Indeed, neither of these elements can properly be said to be wanting; for the mutuality and consideration in such a case consist in the vendee's having actually done, upon the promise of the other party, what he required to have done, and it is immaterial that it was done without having entered into a previous undertaking to do it.[31]

After the time has passed within which one is allowed the privilege of electing to purchase land on certain terms, a tender and offer to perform comes too late.[32]

The written acceptance of a verbal offer, not containing its terms, is within the statute of frauds and inoperative against the person making it; and notwithstanding that such offer is afterwards reduced to writing in the form of a contract by the party making it and offered to the party to whom it is made to sign, the latter may refuse and will not be bound by it.[33]

In the case of bilateral contracts, which contain mutual obligations and reciprocal promises, such as are ordinarily inserted in contracts of sale, if the writing fully expresses the

[30] Perkins v. Hadsell, 50 Ill. 216; Coleman v. Applegarth, 68 Md. 21.

[31] Perkins v. Hadsell, 50 Ill. 216.

[32] Longfellow v. Moore, 102 Ill. 289.

[33] Washington Ice Co. v. Webster, 62 Me. 341.

agreement the rights of the parties are fixed by it. It is customary and proper to have such contracts signed by both parties, and a mutual acceptance thereof thus signified in writing; yet it is well settled that the signature of one party only is sufficient, provided he be the one who is sought to be charged thereby; while in some states the rule obtains that the acceptance by one party of a contract for sale executed only by the other binds the accepting party as well, and that the instrument is regarded as being as much the written agreement of the latter as the former.[34]

§ 128. **Operation and effect.** The ordinary effect of an agreement to convey imports nothing more than an executory promise, and the operation of the instrument will not usually be extended beyond this; yet it will often happen that parties, through ignorance of the legal effect of words, inadvertence or mistake, make use of language which, standing alone, indicates a present grant rather than a mere agreement for some future action.

The employment of the words "grant, bargain and sell," or "do sell," or "by these presents do sell and convey," or words of like character, all import a present grant,[35] and their use is by no means unfrequent in agreements for conveyance. But, notwithstanding the contract contains words of conveyance *in præsenti,* still if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance.[36] In determining whether an instrument is an immediate conveyance or only an executory contract, the intention of the parties must be sought for in every part of the instrument. If it contains words of present assurance, these words afford a presumption that an executed conveyance was intended. But this presumption is not conclusive; it may be overcome by the presence of other words which contemplate a future conveyance.[37] Intention is so imperative in the construction of grants that the strongest words of conveyance in

[34] See Lowber v. Connit, 36 Wis. 176; Hubbard v. Marshall, 50 Wis. 322.

[35] Garver v. McNully, 39 Pa. St. 484; Johnson v. Filson, 118 Ill. 219.

[36] Jackson v. Moncriet, 5 Wend. (N. Y.) 26; Ogden v. Brown, 33 Pa. St. 247; Broadwell v. Raines, 34 La. Ann. 677.

[37] Williams v. Bently, 27 Pa. St. 301.

the present tense have been held inoperative to pass the estate if other parts of the writing evince a contrary intention or tend to show that the agreement itself was not designed to pass title.[38]

If the instrument is called by the parties an agreement, this is a circumstance of importance; for in popular understanding there is a distinction between an agreement and a deed, the former being regarded as preparatory to the latter; and generally, if by the terms of the contract any material act remains to be done, effect will be given to the instrument only as an agreement to sell.

On the other hand, courts have no right to do violence to the express terms of an instrument, and, where such instrument contains the ordinary and technical words to pass title, cannot entirely disregard them. If there is nothing in the instrument to limit or qualify the effect of apt words of conveyance, notwithstanding it may provide for a conveyance in the future, the writing may still have effect as a present conveyance, and the agreement to make a deed at a future day be regarded as simply equivalent to a covenant for further assurance.[39]

It would seem, therefore, that, in the determination of the question as to whether an informal instrument shall be construed as a conveyance or only an agreement to sell, the

[38] Ogden v. Brown, 33 Pa. St. 247; Jackson v. Moncriet, 5 Wend. (N. Y.) 26. A. placed B. in possession of a plantation and certain personal property thereon, under an agreement which stated, "I have this day bargained, sold and delivered to" B. the plantation and articles of personal property enumerated. *Held*, that the contract was evidence, not of a sale, but of an agreement to sell. Broadwell v. Raines, 34 La. Ann. 677. The following writing: "August 20, 1850. I do hereby agree that J. P. shall have the land which he is in possession of now for the labor he done for me over age; and this shall be his receipt for all my rights and claims against the land. [Signed] D. P." —does not convey the absolute title to the land for want of words of limitation, but is merely a receipt for the purchase money of the land. Such writing, however, constitues an agreement to convey sufficient for equity to execute, and is not within the statute of frauds. Phillips v. Swank, 120 Pa. St. 76.

[39] So held in Johnson v. Filson, 118 Ill. 219, where a written instrument from a father to his son recited, among other things, that "I, W. F., of, etc., have this day bargained and do grant, bargain, sell and confirm unto the said," etc., naming the son and describ-

primary rule is the evident intention of the parties derived from the instrument itself, and, when that is doubtful, from the circumstances attending its execution.[40] Technical words of conveyance are not necessary to constitute an executed contract, neither does their presence necessarily indicate one. Notwithstanding technical words of present grant are used, yet, if by reason of something further to be done, or from the tenor of the whole instrument, the design of the parties is manifested that the contract is executory merely, it will be so construed.

§ 129. **Recitals.** The recitals or preamble contained in or prefixed to an agreement do not of themselves have any obligatory force, but they may be referred to in the operative part of the instrument in such a way as to show that it was designed they should form a part of it;[41] and where the words in the operative part of the instrument are of doubtful meaning, the recitals preceding the same may be used as a test to discover the intention of the parties and fix the true meaning of the words. But when the words in the operative part are clear and unambiguous they cannot be controlled by the recitals.[42]

§ 130. **Contracts for repurchase.** Conveyances of land absolute in form are frequently construed, in the light of attendant circumstances, as mortgages in fact, and effect is given to them as such. The questions arising under such conveyances are numerous, and decisions construing them have been multiplied to an almost indefinite extent. It is not proposed in this connection to examine the operation or effect of such conveyances except as regards their availability as contracts for repurchase. Contracts made contemporaneously with absolute conveyances are sometimes strong evidence tending to show that such conveyances are intended to be mortgages; and the same is true of stipulations inserted in the instrument reserving a right to repurchase, or covenanting to reconvey.[43]

ing the land, for the sum of $600 in hand paid, and then bound the father in a penal sum to make the son, by the time mentioned, a good and sufficient warranty deed.

[40] Bortz v. Bortz, 48 Pa. St. 382.

[41] Trower v. Elder, 77 Ill. 452.

[42] Walker v. Tucker, 70 Ill. 527.

[43] Peterson v. Clark, 15 Johns. (N. Y.) 205; Hanford v. Blessing, 80 Ill. 188.

But there is no positive rule that the covenant to reconvey shall be regarded either in law or equity as a defeasance. The owner of lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give the vendor the right to repurchase upon specified terms; and where it appears that the parties really intend an absolute sale, and a contract allowing the vendor to repurchase, such intention must control. Such a contract is not opposed to public policy, nor is it in any sense illegal.[44]

In instruments of this character the fact that there is no continuing debt is a strong circumstance, where there is any doubt, to show that it is a contract for repurchase.[45]

Where sales are made conditionally, or with a reservation of a right in the vendor to repurchase, he must exercise promptness and precision on his part in the assertion of his right, or it will be lost, especially when the vendee pays a fair value for the property.[46] If no time is fixed or expressed in which such right shall be exercised, it must be performed, or an offer made to perform, within a reasonable time.[47] A long delay in offering to repurchase may be excused by and with the consent and approbation of the vendee; but such assent terminates with his death, and the right must be exercised within a reasonable time thereafter.[48]

A mortgagor and a mortgagee may, at any time after the creation of a mortgage and before foreclosure, make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the equity of redemption. All such transactions, however, are regarded with jealousy by courts of equity; and as a party is never allowed to take from his debtor by any form of contract his right to redeem prop-

[44] Hanford v. Blessing, 80 Ill. 188; Henly v. Hotaling, 41 Cal. 22; Glover v. Payn, 19 Wend. (N. Y.) 518.

[45] Phillips v. Hulsizer, 20 N. J. Eq. 308.

[46] The reason for this is apparent. There is no obligation on the part of the vendor to repurchase. Should the property appreciate in value, he may exercise his right and realize the profit; should it depreciate in value or be injured or destroyed, he may decline to repurchase, and permit the loss to fall exclusively on the vendee. Such being the relative situation of the parties to the contract the law requires promptness on the part of the vendor. Beck v. Blue, 42 Ala. 32, 4 Kent Com. 144.

[47] Beck v. Blue, 42 Ala. 32; Larmon v. Jordan, 56 Ill. 204.

[48] Beck v. Blue, 42 Ala. 32.

erty pledged, they will be sustained only when they are in all respects fair and supported by an adequate consideration. They will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in procuring the sale; and courts will examine the transaction to see that it is a fair and independent proceeding, entirely unconnected with the original contract of mortgage.[49]

§ 131. **Bond for conveyance.** A bond for title is not distinguishable in its ordinary operation and effect from a simple agreement for the same purpose, notwithstanding it is conditioned under a penalty. The imposition of a penalty gives only a security for the performance of the contract according to its terms, and is not intended as an option to the obligor; nor does it entitle him to convey or pay the penalty.[50] Like a simple contract, it is evidence only of an agreement of the obligee to purchase and the obligor to sell, the agreement of one party being a consideration for that of the other; and it is not material that the obligation of one party is secured by bond, and that the other is not thus secured.[51]

§ 132. **The description.** Probably more questions arise in the interpretation of contracts and deeds for land in that part technically denominated the description than in any other part of the instrument. Uncertainty, ambiguity and repugnance are common defects, all calling for a construction before the instrument can be given effect. In the West, where property can usually be easily and accurately described by the well-known terms of the government surveys or the equally familiar expressions employed in the platting of cities and towns, questions of insufficient or faulty description are less frequent than in the East; yet the decisions of both sections are harmonious in declaring the general rule that in agreements for the sale or conveyance of land the property is sufficiently identified

[49] Odell v. Montross, 68 N. Y. 499; Locke v. Palmer, 26 Ala. 312; Patterson v. Yeaton, 47 Me. 306; Trull v. Skinner, 17 Pick. (Mass.) 213; Mills v. Mills, 26 Conn. 213; Baugher v. Merryman, 32 Md. 185; Hyndman v. Hyndman, 19 Vt. 9.

[50] Ewins v. Gordon, 49 N. H. 444.

[51] Nor is it material that, when the cause comes on for hearing, the purchaser's part of the agreement has not been performed, if the fulfillment is tendered and can be secured by the same decree which compels specific performance by the vendor. Ewins v. Gordon, 49 N. H. 444.

if so described that by proof *aliunde* the description may be fitted to the land.[52] This rule, however, cannot be made to embrace descriptions which do not properly fall within it, nor can it be extended by implication.[53]

[52] Peck v. Williams, 10 N. Y. 509; Baldwin v. Shannon, 43 N. J. L. 596; Baucum v. George, 66 Ala. 259; Hall v. Davis, 36 N. H. 569; Hotchkiss v. Barnes, 34 Conn. 27; Farmer v. Batts, 83 N. C. 387; Terry v. Berry, 13 Nev. 514; Cato v. Stewart, 28 Ark. 146; Clark v. Powers, 45 Ill. 283. As, for instance, "my Lenoir lands." Thornburg v. Masten, 88 N. C. 293. The "Fleming farm on French creek," *held* to be a sufficiently certain description. Ross v. Baker, 72 Pa. St. 186. "Lot 8, sec. 19, 4, N., 35, E." was held not uncertain under the government system of surveys. Richards v. Snider, 11 Ore. 197. A contract for sale of land described as "a tract of three acres of land, more or less, situate in the township aforesaid," together with proof that the purchaser entered into possession of a certain tract of three acres under the contract, *held*, in ejectment, to be sufficient to take the case out of the statute of frauds. Troup v. Troup, 87 Pa. St. 149. A description of property as "a steam-mill and distillery situate in the county of Smith and state of Tennessee, near the village of Rome, in civil district 13, on the banks of the Cumberland river, supposed to contain one and one-half acres of land," *held*, to be sufficient under the statute of frauds, and parol evidence to be admissible for identification of the premises. White v. Motley, 4 Baxter (Tenn.) 544. All the vendor's "claim or title to property bought of A. and B., and known as the Gentle property," *held* good under the statute of frauds. Smith v. Freeman, 75 Ala. 285. A written agreement by A. to transfer to B. a lot of land near Florence, north of the fair grounds, containing thirty-five acres, more or less, is not void for uncertainty, it appearing that A. owned but one such lot in that vicinity. O'Neil v. Seixas (Ala.), 4 South. Rep. 745. "A house and lot or land situated on Amity street, Lynn, Mass.," was held sufficient, the vendor only owning one house and lot of land on the street. Hurley v. Brown, 98 Mass. 545. But specific performance has often been refused of contracts containing no more specific designation. See Hammer v. McEldowney, 46 Pa. St. 334; King v. Ruckman, 5 C. E. Green (N. J.) 316. Indeed, the case of Hurley v. Brown may be considered as stating an advanced doctrine and at variance with well-established rules of construction.

[53] Thus, a contract for the sale of land described as "sixty acres Comida and Cove bottom, also ten acres hillside woodland adjoining the Mitchell tract," was held void on its face for uncertainty. Meyer v. Mitchell, 75 Ala. 475. "Forty acres off the Spring Fork end of my tract of one hundred and forty-seven acres on Beech Fork in Calhoun county" was held too indefinite to be enforced. Westfall v. Cottrills, 24 W. Va. 763. "Twenty acres of land," without other description, held void for uncertainty. Palmer v. Albee, 50 Iowa 492. A contract to convey "a piece of land supposed to be forty acres"

In construing a contract or deed, the description in which is doubtful, the evidence competent to be considered is the language of the instrument and the surrounding circumstances at the time of its execution, including the situation of the parties and the object they had in view;[54] and the practical interpretation by the parties themselves is entitled to great if not controlling influence.[55] But this latter rule has an application only when there is doubt as to its true meaning; for, where its meaning is clear, an erroneous construction of it by them will not control its effect.[56]

is too uncertain for a decree, and too indefinite to permit the introduction of parol evidence to make it more certain. Jones v. Carver, 59 Tex. 293. An agreement to sell "one-half acre of land adjoining K.'s lot on the east and running due west," it has been held, does not describe the boundaries with sufficient certainty to satisfy the statute of frauds; and oral evidence to show the boundaries agreed upon is inadmissible. Sherer v. Trowbridge, 135 Mass. 500. A memorandum which described the land sold as a "lot on Eighteenth street, 50x180, about three hundred feet south of Herbert street," was held not sufficient to satisfy the statute of frauds. Schroeder v. Taaffe, 11 Mo. App. 267. An agreement to convey "my land, . . . the entire tract, seven hundred and twenty-eight acres," held to be too ambiguous to be enforced in equity. Barnet v. Nichols, 56 Miss. 622; and see Thompson v. Gordon, 72 Ala. 455; Eggleston v. Wagner, 46 Mich. 610; Johnson v. Granger, 51 Tex. 42; Scarritt v. M. E. Church, 7 Mo. App. 174. A description of land as "lots Nos. 1 and 2 on F street," without reference to any plan by which the premises could be identified, *held* not to be sufficient memorandum under the statute of frauds. Clark v. Chamberlin, 112 Mass. 19. An agreement to sell "one-half acre of land adjoining K.'s lot on the east and running due west" does not describe the boundaries with sufficient certainty. Sherer v. Trowbridge, 135 Mass. 500. A contract for the sale of "two and one-half acre tract of land, being the first half of the five-acre tract along by the fence just back of the Chicago Catholic burying ground," is not specific enough to satisfy the statute of frauds. Pierson v. Ballard, 32 Minn. 263. A description of land in an agreement to convey as five acres, lot 3, section 23, etc., there being nothing to show what five acres are intended, is not a good description, and the defect cannot be supplied by parol. Nippolt v. Kammon (Minn.), 40 N. W. Rep. 266; and see King v. Ruckman, 5 C. E. Green (N. J.) 316; Hammer v. McEldowney, 46 Pa. St. 334.

[54] Preble v. Abrahams, 88 Cal. 245; Kennedy v. Gramling, 33 S. C. 367.

[55] Chicago v. Sheldon, 9 Wall. (U. S.) 50; Fire Ins. Co. v. Doll, 35 Md. 89; Preble v. Abrahams, 88 Cal. 245.

[56] Fire Ins. Co. v. Doll, 35 Md. 89.

As just stated, a contract cannot be extended by implication; nor can it be so extended by express language when, from the general wording of the instrument, a contrary intent is manifest or deducible under the application of recognized legal rules. Thus, where the contract specifically describes the lands and states the quantity, it has been held that the contract cannot be extended to cover other lands than those thus described, although it contains a clause that the purchase is intended to be of all the lands still belonging to the vendor.[57]

The general rule would seem to be that, when land forms the subject-matter of a contract, it must be so described as to leave no uncertainty as to its shape, quantity and location; and if these particulars are entirely wanting, or can only be supplied by a resort to parol evidence, the memorandum is insufficient to warrant an enforcement of the contract or a decree of conveyance. Where a sufficient description is given, parol evidence may be resorted to in order to fit the description to the land; but where the description is insufficient or vague and uncertain, and the uncertainty is patent, or where there is no description, such evidence is inadmissible.[58]

§ 133. **Continued—Unlocated land.** Not infrequently contracts are made for the sale of land in specific quantities but undesignated location, sometimes taking the form of grants *in præsenti,* and at others of a simple contract to convey. The exact nature of such a contract is difficult to determine,

[57] Gibbs v. Diekma, 102 U. S. (L. ed.) 177. In this case there was a contract for the sale of certain lands which were specifically described, after which was added the following clause: "This purchase is intended to be of all the lands still belonging to the said Holland Harbor Board, the same being one thousand five hundred and sixty acres, more or less, at ninety cents per acre. If it shall be found that any of the above-described lands have before this date been conveyed to other parties, such lands shall not be included in this sale." It afterwards appeared that the Board still owned five thousand acres instead of one thousand five hundred and sixty. The court held that the clause just shown was evidently added by way of limitation, so as to exclude from the sale any of the parcels specifically described which should be found to have been previously contracted to other parties. And see Brunswick Savings Inst. v. Crossman, 76 Me. 577.

[58] Hamilton v. Harvey, 121 Ill. 469; Miller v. Campbell, 52 Ind. 125; Hammer v. McEldowney, 46 Pa. St. 334; Jordan v. Fay, 40 Me. 130; King v. Ruckman, 20 N. J. Eq. 316; Lynes v. Hayden, 119 Mass. 482.

whether in form a covenant to convey or a present grant. In the policy of the land system of the federal government, grants of this nature are permitted, the grant being in the nature of a "float," which does not attach to any particular parcel until located; but upon a definite location the title to each particular parcel is held to be as complete as if it had been granted by name, number or location.[59] The application of this principle to private grants is, however, radically opposed to many of the best known and most firmly established rules of law. An executory contract for the sale of a specific quantity to be taken from a choice of designated localities, the respective localities being themselves definitely established, would probably be enforced upon the exercise of the right of selection given. If in form a deed of present grant it would, of course, be inoperative to convey a legal title; but it would be doing no violence to established rules to say that it would confer an equity in the enumerated quantity of land, depending on the exercise of the vendee's right of selection.[60] But a contract to convey a stated number of acres in a certain county or state, without other or further description, would be void for vagueness and uncertainty.[61]

§ 134. **Continued—History of title.** It is no uncommon practice to insert in contracts and conveyances a mention of some incident in the history of the title, as that the property is the same premises conveyed to the vendor by a certain per-

[59] See 9 Opinions Att'y-Gen. 41; R. R. Co. v. U. S. 92 U. S. 733.

[60] See Dull v. Blum, 4 S. W. Rep. (Tex.) 489. In this case a grant of one hundred acres to be taken in a rectangular form out of any of the four corners of a designated tract which the grantee might select was denied operation as a deed, but permitted to stand as an executory contract for the conveyance of the enumerated quantity upon the vendee's selecting same. And see Carlyon v. Eade, 48 Iowa 707.

[61] Newman v. Perrill, 73 Ind. 153. The contract in this case was to convey "one hundred and sixty acres of land in any one of the following counties in the state of Missouri," naming them; *held*, that the right to demand a conveyance could not be enforced, the contract in reference thereto being invalid for want of a description. But see Carlyon v. Eade, 48 Iowa 707, where it was held that a contract by A. that B. might have his choice of whatever land A. might have in a specified county gave B. the right to demand and receive from A. a list of A.'s lands from which to make the selection.

son at a prior date, or which he acquired as heir of a person named, or as distributee of a certain estate, etc. Such descriptions standing by themselves or in connection with other and less particular descriptions are frequently of great utility in definitely locating the land by reference to extrinsic facts; and, like descriptions by designation, of which they may be said to form a species, are effective to pass the estate of the grantor in all the lands that can be shown to fall within their terms.

But if there exists no doubt or question as to the identity or location of the land in question, which is described with absolute certainty by metes and bounds, with statement of quantity or reference to visible monuments, the mention of events in the history of the title is of comparatively little moment. If the incidents are correctly stated they may be regarded as recitals only; and if, on the other hand, the statements create an apparent repugnancy, they will not be permitted to have force against the mention of metes, bounds, courses, distances and visible monuments. When a piece of land is so described that a surveyor's chain can be stretched along its boundaries with absolute certainty as to each course and distance, a transposition of dates in stating previous conveyances constituting the chain of title, or an erroneous mention of any incident occurring in the history of its devolution, will not cloud or affect that certainty, nor destroy the operative force of a conveyance.[62] Ordinarily references are made to prior conveyances, not so much for the purpose of fixing the boundaries as to show the grantor's chain of title, and in construing descriptions this view is usually taken by the courts.

The true interpretation, therefore, of recitals of this character seems to be that they are to be regarded merely as descriptive of the thing granted and not of the quantity of the grantor's interest.[63]

[62] Sherwood v. Whiting, 8 Atl. Rep. 80; Hastings v. Hastings, 110 Mass. 280; Deacons v. Walker, 124 Mass. 69.

[63] As where a deed containing a full and sufficiently accurate description of the lands conveyed then proceeded to further identify them as being the same lands which were described in two mortgages therein specified, and this in turn was followed by the clause: "Intending to convey the same lands and no other which passed to

§ 135. **Description by designation.** The chief requisite of a description consists in the identification of the property, and if this result can be attained so as to indicate the property with certainty, formality is immaterial. Thus, a "house and lot" or "one house and lot," in a particular locality, would be insufficient, because too indefinite on the face of the instrument itself; but "my" house and lot imports a particular house and lot, rendered certain by the description that it is the one which belongs to "me;" and where the instrument does not itself show that the vendor had more than one house and lot, it will not be presumed that he had more than one. In such case it has been held there is no patent ambiguity. If it be shown that he has more than one, it must be by extrinsic proof; and hence, it is held, the case would then be one of latent ambiguity, which may be explained by similar proof.[64] This doctrine has in some cases been carried to extreme lengths.[65]

A description by designation, used in connection with other descriptions which call for courses, distances, etc., will in some cases overcome such other descriptions when same are

me by virtue of the foreclosure of said mortgages." *Held*, that the latter clause should not be treated as anything more than a reference to the mortgages and decree for further and more particular description. Wilder v. Davenport's Estate, 58 Vt. 642.

In the foregoing case, which was an action on the covenant of warranty, it was contended that the final clause in the description above quoted controlled the previous description by metes and bounds, and limited the amount of land conveyed to what the grantor actually owned; but the court say: "It is hardly supposable that any man intends to convey land that he does not own. It would therefore be introducing complete uncertainty in deeds if, after a precise description by metes and bounds, without exception or reservation, such description could be overcome when it turned out that the grantor did not own all he described, by adding a clause as to his intent."

[64] Carson v. Ray, 7 Jones' L. (N. C.) 609.

[65] All "my" lands on both sides of Har river, has, under the rule, been held sufficient. Henly v. Wilson, 81 N. C. 407. "My Lenoir lands" held good, the description being such that by proof *aliunde* the description may be fitted to the land. Thornburg v. Matsen, 88 N. C. 293. An agreement as follows: "I agree to make good titles in fee to my forty near the G. lands in H. county to A. B.," and stating the receipt of a consideration, and signed, *held*, to contain a sufficient description of the land to be sold to satisfy the statute. Lente v. Clarke, 22 Fla. 515.

repugnant to or inconsistent with the designatory description. Thus, in an agreement for a deed the land was first described by numbers and dimensions and then as the property known as the "Cook & Glover block." The plain intent seemed to be that the property to be conveyed was a certain "block," but the parties by mistake assumed that it covered only one-half of a certain lot and the land was so described, whereas it occupied two and one-half feet more of the lot, which, if the description by numbers and dimensions were to prevail, would leave that part unconveyed. It was therefore held that the words "Cook & Glover block" were the controlling and descriptive words; that in effect it was the "block" which was conveyed; and that, as the same was a fixed and permanent monument, any words of description repugnant thereto should be rejected.[66]

A description by some well-known or commonly-accepted name has frequently been held to answer the requirements of the statute and to permit of specific performance of the contract.[67] The American cases which announce this rule are largely influenced by English precedents, the designatory method of description being much employed in England.

§ 136. **The medium of payment.** Where land is sold for a money consideration the medium of payment is ordinarily expressed in "dollars," with the not infrequent addition, "lawful money of the United States." It would seem that such a statement would leave little or no room for contention or admit of questions of construction; yet there exists a large body of case law which has arisen in the construction of the federal constitution and the various acts of congress and the state legislatures in regard to what constitutes a legal tender in payment of obligations founded on contracts made in time of peace as well as in time of war.

The federal constitution[68] provides that no state shall "make

[66] Lyman v. Gedney, 114 Ill. 388.

[67] A writing describing the property sold as "Silver Lake Place, near Washington, Kentucky, containing fifty-two acres," *held* sufficient to satisfy the requirements of the statute. Winn v. Henry, 84 Ky. 48. So a bond expressing as its consideration all the vendor's "title or claim to property bought of A. and B., and known as the Gentle property," *held* good under the statute of frauds. Smith v. Freeman, 75 Ala. 285.

[68] Art. I, § 10.

anything but gold and silver coin a legal tender for the payment of debts;" but congress, during the earlier years of the civil war, passed several laws known as the legal-tender acts, whereby United States treasury notes were declared to be a legal tender for the payment of all private debts. The constitutionality of these acts, though much doubted at the time, was finally affirmed by the supreme court.[69] To avoid the depreciation in value which at different times has attended the United States treasury notes, parties frequently make their contracts payable in "gold coin," or, in "gold coin of the present standard of weight and fineness." The earlier cases would seem to hold that such contracts amounted to nothing more than obligations to pay the nominal value in any money that was a legal tender;[70] but later cases have established the doctrine that a contract to pay in a particular kind of coin may be specifically enforced.[71] In the rendition of such decisions it would seem that it is not on the basis of a difference in the values of money that the courts will enforce a contract or render a judgment for a specific kind, for the law will not recognize any difference in value between one kind of money which is a legal tender and any other kind which possesses the same character;[72] but it is upon the ground that the parties have specifically contracted, just as they might have contracted for payment in any other commodity, for payment in a specific thing; and hence the obligor is bound to tender that specific thing—gold or silver coin, as the case may be—precisely as he would be bound to tender a specific quantity or quality of any other commodity.[73]

A covenant to pay in "lawful money," or in "dollars," is in

[69] By virtue of the paramount right of congress, and upon the ground that the constitutional inhibition was directed only to the states and not to the federal government. See Legal-tender Cases, 110 U. S. 421; and, also, George v. Concord, 45 N. H. 434; Black v. Lusk, 69 Ill. 70; Verges v. Gibony, 38 Mo. 458.

[70] Appel v. Waltman, 38 Mo. 194; Laughlin v. Harvey, 52 Pa. St. 9; Brown v. Welch, 26 Ind. 116.

[71] Whitaker v. Dyer, 56 Ga. 380; Chesapeake v. Swain, 29 Md. 483; Ins. Co. v. Thomas, 104 Mass. 192; Kellogg v. Sweeney, 46 N. Y. 291; Bronson v. Rodes, 7 Wall. (U. S.) 229.

[72] Wells, etc. v. Van Sickle, 6 Nev. 45; Reese v. Stearns, 29 Cal. 273; Bank v. Burton, 27 Ind. 426.

[73] Wells, etc. v. Van Sickle, 6 Nev. 45; Bank v. Van Vleck, 49 Barb. (N. Y.) 508.

legal effect payable in whatever the laws of the United States declare to be a legal tender.[74]

An interesting question arises when the contract is to pay the purchase price in some commodity other than money, and the decisions upon the subject seem to be conflicting. The question usually arises when an attempt is made to pay, or to demand payment, in money instead of the specific articles contracted for. There are cases which adopt the theory that provisions of this character in regard to the mode of payment are inserted only for the benefit of the debtor, and that they give to him the privilege to pay either in money or the articles specified, as he may elect; but the better reason, as well as the volume of authority, would seem to indicate a contrary rule. The decisions which support the latter principle proceed upon the theory that, when a contract expressly provides that payment shall be made in a specific article at a specified price, to permit the parties to do otherwise is to insert into the contract provisions which they have not made. The mere fact that such a contract specifies a certain number of dollars as the consideration does not necessarily imply that the vendor was willing to sell his property for that amount in money; for it may be the sum was only fixed in view of the other provision for payment in a specific article at a specified price, and that mode of payment may have been the very reason that induced the vendor to make it.

Again, the rule first stated being devoid of mutuality is intrinsically unjust. Thus, if the value of the article in which payment is to be made falls below the specified price, all the cases hold that the debtor may still pay in that article at that price. But if the value rises above that price, to say that he may elect to pay in money is to say that the vendor must lose by the fall of the value of the article he contracts for, but cannot gain by the rise.[75]

[74] Miller v. Lacey, 33 Tex. 351.

[75] See Wilson v. George, 10 N. H. 445; Cole v. Ross, 9 B. Mon. (Ky.) 393. In Starr v. Light, 22 Wis. 433, the plaintiff sold land for which the defendant agreed to pay in merchantable wheat of a certain quality, the price to be seventy-five cents per bushel, and the wheat to be delivered at certain times and quantities. Before the time of delivery wheat became worth much more than seventy-five cents per bushel. The defendant claimed the right to pay in money the consideration named; but the

§ 137. **Conditions in avoidance.** A familiar provision in agreements for sale is that where, in the event of failure on the part of the vendee to comply with the terms and conditions thereof, the vendor is to be released from all obligations to convey the bargained property, the vendee to forfeit all right thereto, and the agreement to be void. This clause is now always construed to give the vendor an option, on the happening of the contingency, either to avoid the agreement or to enforce it.[76] The vendee, however, cannot set up his own neglect as avoiding the contract, even though the terms are express that the contract shall be void; for they are only held to mean that the contract shall be void at the election of the vendor, for whose benefit the provision is inserted.[77]

Conditions are ordinarily raised by way of proviso; but while the words "provided that" and "provided also" are competent to create conditions, and are usually so construed, they do not always have that effect. Whether there is a condition, or whether it be precedent or subsequent, is to be determined from the intent of the parties as indicated from the whole language used and the nature of the act required.[78]

§ 138. **Time of performance.** The subject of time as a constituent element of a contract has already been considered, and the general rule stated that, where no time is mentioned in a contract for the performance of its conditions, and it cannot be gathered from the language employed what was the intention in this respect, the law will imply a reasonable time, and that what is a reasonable time will depend upon the peculiar circumstances of the case. This rule, while of general application, is particularly adapted to those agreements whereby a party undertakes to do some particular act the performance of which depends entirely upon himself, and the contract is silent

court held that the vendor was entitled to the wheat, or in default thereof he might recover its actual value at the time specified for its delivery, and that the vendee had no right to pay in money instead of wheat the amount of the purchase price. And see, also, Wells v. Van Sickle, 6 Nev. 45; Bank v. Van Vleck, 49 Barb. (N. Y.) 508.

[76] Wilcoxon v. Stitt, 65 Cal. 596; Canfield v. Westcott, 5 Cow. (N. Y.) 270.

[77] Mason v. Caldwell, 5 Gilm. (Ill.) 196; Cartwright v. Gardner, 5 Cush. (Mass.) 281.

[78] Schwoerer v. Market Ass'n, 99 Mass. 285.

as to the time in which it should be done. In such cases the law, without reference to extraordinary circumstances, will imply that it shall be performed within a reasonable time. Thus, where a party has obligated himself to pay a given sum of money by a future day, which is fixed as the time for the full performance, and it is agreed that the sum to be paid may be increased or diminished by the performance of another act left to the option of the parties, the law will require either party, or the party holding the option if there be only one, to exercise such option and perform such act before full payment of the sum named is made; and after full payment the party will be held to have waived his right to do the act entitling him to a further sum or to a diminution, as the case may be.[79]

§ 139. **Computation of time.** Where a specified number of days is provided for the delivery of an abstract, an examination of the title, the payment of money or the performance of any other particular act or duty, and the time is to be computed from a particular day or the happening of a particular event, such day so specified, or the day of the happening of such event, is to be excluded from the computation; for the law rejects fractions of a day, and an act done in the compass of it is not referable to one portion of the day more than another, so that the act is not considered to be passed and done with until the day has passed. The general rule, therefore, is to exclude the first and include the last day of the limit, yet this rule has many exceptions and is not to be regarded as fixed or unyielding; and in considering whether, upon a contract to do an act or enter into an engagement at or for a definite time from a certain date, the time is to be reckoned exclusively or inclusively of the last day, each case

[79] As, where the owner of a farm supposed to contain four thousand four hundred and forty-one acres sold the same at a stipulated sum per acre, the purchase money to be paid in instalments at times fixed by the contract. It was further provided in the contract that either party might, at his own expense, survey the land if he saw fit, to ascertain the number of acres, and if such survey showed the land to contain more acres than the parties supposed, the purchaser should pay the difference, and if it contained less, the amount of the deficit should be deducted from the purchase money or credited upon the notes evidencing the deferred payments. Some seven years after the date of the last payment the vendor had a survey

must depend largely upon its own circumstances, the relative situation of the parties and the subject-matter.

Where the computation is made in months, a calendar month is understood, unless it appears from the general context of the contract that a lunar month was intended.

§ 140. Assignment of contract for security. The assignment of a contract for the purchase of land by the vendee therein named as a security for a debt due the assignee is in equity a mortgage, and, being of an interest in real estate, must be governed by the rules which are applicable to a mortgage of the legal estate.[80] The assignee has a right to foreclose upon condition broken, and the assignor the corresponding right to redeem.[81]

made and brought suit against the purchaser for an excess shown by the survey. *Held*, that he could not recover, the survey after payment of the last instalment being too late. Hamilton v. Scully, 118 Ill. 192.

[80] Brockway v. Wells, 1 Paige (N. Y.) 617; Alderson v. Ames, 6 Md. 52; Baker v. Bishop Hill Colony, 45 Ill. 264; Bull v. Shepard, 7 Wis. 440; Christy v. Dana, 34 Cal. 548.

[81] And while, on a bill to redeem, the mortgagor generally pays costs, yet if, on application before suit, the mortgagee refuses to allow redemption, he may be compelled to pay costs. Brockway v. Wells, 1 Paige (N. Y.) 617.

CHAPTER V.

VALIDITY OF LAND CONTRACTS.

ART. I. GENERALLY CONSIDERED.
ART. II. AS AFFECTED BY THE STATUTE OF FRAUDS.

ARTICLE I. GENERALLY CONSIDERED.

§ 141. Preliminary remarks.
142. Conflict of laws.
143. Executed contracts.
144. Agreements prohibited by statute.
145. Agreements against public policy.
146. Agreements void in part.
147. Allotments by chance.
148. Sunday contracts.
149. Agreements to convey by will.
150. Contracts procured by fraud.
151. Ante-nuptial contracts.
152. Post-nuptial contracts.

§ 141. Preliminary remarks. The subject of this chapter is so intimately connected with other branches of the law governing the relation of vendor and purchaser, and with the rights and remedies growing out of such relation, that only its general features can be shown without repeating what can be more advantageously stated in other parts of the work and in connection with collateral topics which serve to illustrate the special phases of invalidity. Fraud, deceit, circumvention, misrepresentation, etc., are matters which go to the validity or invalidity of a contract, but these matters are best shown in connection with the remedies which are founded upon them.

Contracts invalid *per se* are few in number and limited in character; on the other hand, contracts void at the election of one or both of the parties are very numerous and have a wide range on which to predicate invalidity. Contracts made in contravention of positive statute, or such as injuriously affect public morals, or are opposed to the spirit and policy of the laws, are for that reason void and incapable of enforcement if executory, or of rescission if executed; but contracts which derive their invalidity from some of the ingredients entering into the same, and which do not come strictly within the legal definitions of the class of contracts first mentioned, are

avoided only by some act of the parties indicative of disaffirmance.

§ 142. **Conflict of laws.** It is a well recognized principle of law that the validity of a contract is to be decided by the law of the place where it was made, unless, either expressly or impliedly, it appears that it is to be performed elsewhere. It is a further principle that, if valid by the law of the place where made, it is generally valid everywhere; and if, in the jurisdiction where made the law would enforce it, it will be enforced in the jurisdiction to which a party may be compelled to resort for a remedy for its violation. But to this rule there is the exception, that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws.[1]

Both the rule and the exception find their most frequent application in contracts and sales relating to chattels, but there is no distinction, in principle, between personal or real property whenever the doctrine is invoked as a rule of action.

§ 143. **Executed contracts.** An executed contract, though tainted with fraud, is nevertheless binding upon the parties,[2] and will not be disturbed on the ground that it is contrary to public policy;[3] nor for want of consideration;[4] nor will the court under such circumstances inquire into the legality of the consideration.[5] These principles have always been strictly enforced in all transactions between parties resting under no disability or laboring under no incapacity. Hence, an executed contract for the sale of land based upon illicit sexual commerce cannot be set aside at the instance of the grantor or his heirs;[6] nor will the fact that the property is to be used

[1] Banchor v. Mansel, 47 Me. 58; Hill v. Spear, 50 N. H. 253; Robinson v. Queen, 87 Tenn. 445; Sondheim v. Gilbert, 117 Ind. 71.

[2] Noble v. Noble, 26 Ark. 317; Ager v. Duncan, 50 Cal. 325; Setter v. Alvey, 15 Kan. 157; Clark v. Colbert, 67 Ala. 92; White v. Hunter, 23 N. H. 128.

[3] Levet v. Creditors, 22 La. Ann. 105; Meriwether v. Smith, 44 Ga. 541; Marksbury v. Taylor, 10 Bush (Ky.), 519.

[4] Mercer v. Mercer, 29 Iowa, 557; Beauchamp v. Comfort, 42 Miss. 94.

[5] Kerr v. Birnie, 25 Ark. 225; Thomas v. Cronise, 16 Ohio 54.

[6] Marksbury v. Taylor, 10 Bush (Ky.), 519.

for an immoral purpose impair a deed for the same.[7] So, also, where title was acquired as the result of a bet,[8] the court refused to interfere, holding that it is a universal principle both at law and in equity, that, where an agreement is founded upon a consideration illegal, immoral or against public policy, a court will leave the parties where it finds them. If executed, courts will not rescind it; if executory, they will not aid in its execution.[9] A deed of land made in consideration of the composition of a felony cannot be avoided by the grantor.[10]

§ 144. **Agreements prohibited by statute.** A contract which is forbidden by statute is incapable of enforcement in any court,[11] even though the statute may have been repealed after such contract was made.[12] This is the general rule; and it is a further principle in connection therewith, that where a statute prohibits a transaction, although without in terms declaring it void, it is void notwithstanding if done in violation of the statute.[13] The effect of the prohibition is to render the prohibited dealings void.[14]

The subject of this section finds many examples in the law of vendor and purchaser where real property is sold in connection with other matters; as where a professional man sells his property and practice and at the same time enters into stipulations restraining his right to further pursue his calling.

[7] Sprague v. Rooney, 82 Mo. 493. The text states the correct rule but compare Sprague v. Rooney, 104 Mo. 349.

[8] Thomas v. Cronise, 16 Ohio, 54.

[9] See Atwood v. Fish, 101 Mass. 363; Crowder v. Reed, 80 Ind. 1; Cushwa v. Cushwa, 5 Md. 44; King v. King, 61 Ala. 479.

[10] Worcester v. Eaton, 11 Mass. 368. But a deed given to procure a release from imprisonment on legal process regular in its form, in a suit instituted maliciously and without probable cause, may be avoided for duress. Watkins v. Baird, 6 Mass. 506.

[11] Gilliland v. Phillips, 1 S. C. 152; Fowler v. Scully, 72 Pa. St. 456.

[12] Gilliland v. Phillips, 1 S. C. 152. But if the parties renew the contract after the repeal it may then become valid. Carr v. Bank, 29 La. Ann. 258.

[13] Watrous v. Blair, 32 Iowa, 58; Swords v. Owen, 43 How. Pr. (N. Y.) 167.

[14] Swords v. Owen, 43 How. Pr. (N. Y.) 167; Dillon v. Allen, 46 Iowa, 299. The distinction in some of the old cases between *malum prohibitum* and *malum in se* has long since been exploded, and the rule is now well established that no agreement to do an act forbidden by statute or to omit to do an act enjoined by statute is binding. Penn v. Bornman, 102 Ill. 523.

There can be no doubt, however, but that parties may make a valid agreement in restraint of trade, where the operation of the agreement is partial and limited under reasonable conditions, and where it is supported by a valuable consideration. Such a contract may be enforced by an action at law for the recovery of damages for its breach, and may be upheld in equity by a decree requiring it to be specifically performed, and an injunction will be granted to restrain its violation.[15]

Agreements to convey land will not be sustained where by law one or both of the parties have no capacity to consummate the agreement, or where an express prohibition exists of the right to acquire and hold for any except a specific purpose, and such specific purpose is not contemplated by the proposed sale.[16]

As a general rule, a penalty prescribed by statute for the doing of an act implies a prohibition which will render the act void, yet this is not always so; and in every instance courts will look to the language and subject-matter of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by it. If from all these it is manifest that it was not intended to render the prohibitory act void, the courts will so hold and construe the statute accordingly.[17] Applying this rule it has been held that a statute imposing a penalty upon any person who shall sell or lease any lot in any town, city or addition thereto until the plat thereof has been duly acknowledged and recorded does not operate as a prohibition upon the sale itself, but only

[15] Cobbs v. Niblo, 6 Ill. App. 60. Where the defendant sold the plaintiff a piece of land and a grocery store, and made at the same time a verbal agreement not to carry on the same business within prescribed limits, it was held that this agreement, being a part of the inducement to the purchaser, was made upon a valuable consideration, though the agreement did not enhance the price paid for the land. Peirce v. Woodward, 6 Pick. (Mass.) 206.

[16] Thus, an agreement to give a railroad company an interest in certain lands or town lots provided it would locate its station at a certain specified place is void, for the reason that a railroad company has no authority to acquire land for purposes of speculation under a grant of power to acquire and hold sufficient land for the construction of its road, erection of necessary buildings, etc. Pacific R. R. Co. v. Seely, 45 Mo. 212.

[17] Pangborn v. Westlake, 36 Iowa, 546.

imposes a penalty upon the seller and hence the purchase of such a lot, the plat of which is not recorded, is not rendered invalid by the enactment;[18] and further, that it does not render void a note given for the purchase money of lots so sold.[19]

§ 145. **Agreements against public policy.** Where both parties to a contract, void as against public policy, are equally at fault, the law will leave them as it finds them. If the contract be still executory, it will not enforce it nor award damages for its breach. If already executed it will not restore the price paid nor the property conveyed.[20] If either party has obtained an advantage under it he will be permitted to retain it, and no subsequent acts of the parties will have the effect to ratify or confirm the contract, or estop them from asserting its invalidity.[21]

In general, public policy, as the term is used in the foregoing paragraph, is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or which is contrary to the general welfare of society. It has been said, that public policy is a variable quality, and hence not always to be defined or distinguished by any inflexible rule. This is undoubtedly true, yet

[18] Watrous v. Blair, 32 Iowa, 58.

[19] Pangborn v. Westlake, 36 Iowa, 546.

[20] Setter v. Alvey, 15 Kan. 157. In this case a town company, the occupants, and all interested in the town site, made a contract with a county to deed it certain lots on the town site, provided the county seat was located at the town, and afterward the county seat was so located and the lots deeded; *held*, that neither the town company, the occupants, the parties interested in the town site, nor one claiming under them, could avoid the deed or recover the land.

[21] As where plaintiff and defendant agreed in writing that on a partition sale of certain real estate, of three-sevenths of which the defendant was owner as trustee for infants, the defendant would not bid, and that, if the plaintiff should become the purchaser, plaintiff should pay four-sevenths and defendant three-sevenths of the purchase money, and that the property should be divided between them on a line agreed upon, *held*, that such an agreement was void as against public policy, and that plaintiff, having purchased at the sale and taken a conveyance, could sustain an action of ejectment to recover from defendant the part which the latter claimed under the agreement, and of which he was in possession, notwithstanding the fact that plaintiff had received from defendant his share of the purchase price, and had made no offer to refund it; further, that plaintiff was not estopped from set-

the principles which support the theory have always remained unchanged and are, from their nature, unchangeable. Thus, public policy is only variable in so far as the habits, capacities and opportunities of the public have become varied and complex; the relations of society change with the times; new laws with respect to public and private rights are enacted; new definitions of reciprocal duties and obligations are promulgated, and so, while public policy may be said to change in compliance with the changing features of the law, yet such changes are, after all, but new applications of old principles, made to meet the varying exigencies of the times.

As a general proposition it may be said, that whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the laws or other official action, whenever embodied in, and made the subject of, a contract, is against public policy, and the contract, for that reason, will be void, and incapable of enforcement. All contracts prejudicial to the interest of the public, whenever the statute or any known rule of law requires it, are void.[22]

This is true not only with respect to contracts which involve the commission of an illegal act, but applies as well to agreements which contravene the spirit and policy of the laws by an attempt to evade their effect.[23]

To make a contract unlawful as being against public policy and law it must be manifestly and directly so; and it is not enough that the contract is connected with some violation of the law, however remotely or indirectly.[24] The illegality must form a part of the consideration, or in some way furnish the

ting up the illegality of the contract, and being the legal owner of the premises, was entitled to recover the portion claimed. Wheeler v. Wheeler, 5 Lans. (N. Y.) 355.

[22] Brooks v. Cooper, 50 N. J. L. 761; Consumers Oil Co. v. Nunnemaker, 142 Ind. 560.

[23] Such as an agreement that a person shall enter and purchase a tract of public lands for the purpose of selling it to a person who would not be competent, by law, to enter and purchase it himself. Brake v. Ballou, 19 Kan. 397. See also in support of the general proposition, Cannon v. Cannon, 26 N. J. Eq. 316; Blasdell v. Fowle, 120 Mass. 447.

[24] Bier v. Dozier, 24 Gratt. (Va.) 1.

motive for the contract. Thus, a contract for the sale of land depending on the result of an election, on the question of a park in the locality, in a certain way, as a condition precedent to its taking effect, such result being an essential part of the consideration, is void upon grounds of public policy.[25]

The rule that contracts which contravene public policy and the law are void, and that courts will never lend their aid to enforce them, has been held to apply where the intention of one of the parties is to enable the other to violate the law;[26] yet, in transactions relating to the sale of land, this rule must be understood as qualified, to some extent at least, by the rule last stated, and a contract of sale for an unlawful purpose is not, for that reason, void, unless forbidden by statute. Thus, a contract to sell a house to one who intends to keep it as a bawdy-house is not illegal thereby because the vendor knows the intention.[27]

§ 146. Agreements void in part. The rule is that if any part of the entire consideration for a promise or any part of the promise be illegal, whether by statute or at common law, the whole contract is void, if the illegality form any part of

[25] So held where the purchasers of land deposited with a stakeholder their checks for $5,000 in favor of the vendor's agent, the parties signing an agreement that the checks should be delivered to the payee in case a vote to be taken on that day in West Chicago should be in favor of what was known as the West Park bill; but, in case the majority of the votes should be cast against said bill, then the checks were to be delivered to the drawers. Merchants', etc. Co. v. Goodrich, 75 Ill. 554.

[26] Tatum v. Kelley, 25 Ark. 209.

[27] Sprague v. Rooney, 82 Mo. 493; but compare Sprague v. Rooney, 104 Mo. 349. No nation or state is bound to recognize or enforce contracts which are injurious to its interests, the welfare of its people, or which are in fraud or violation of its own laws. Hill v. Spear, 50 N. H. 253; Gaylord v. Soragen, 32 Vt. 110; Feineman v. Sachs, 33 Kan. 621. Yet the mere knowledge of the unlawful intent of the vendee would not debar a vendor from the enforcement of his contract so long as he did not in any way aid the vendee in the violation of law. This has always been the recognized rule in regard to sales of chattels, and the principle is the same in its application to real property. Wallace v. Lark, 12 S. C. 576; Tracy v. Talmage, 14 N. Y. 162; Henderson v. Waggoner, 2 Lea (Tenn.), 133; Rose v. Mitchell, 6 Colo. 102; Brunswick v. Valleau, 50 Iowa, 120; Michael v. Bacon, 49 Mo. 474. The vendor must do something in furtherance of the vendee's design to violate the law; but positive

the contract itself.[28] But if a contract, part of which is repugnant to law and against public policy while the other part is not, can be divided, so much as is unexceptionable may be enforced;[29] yet a separation of the good consideration from that which is illegal will be attempted only in those cases in which the party seeking to enforce the contract is not the wrongdoer. Where both parties are in equal fault, no remedy can be had in a court of justice on an illegal transaction.[30]

Where the contract is for the doing of two or more things which are entirely distinct, and one is repugnant to law while the others are legal, the illegality of the one stipulation will not ordinarily affect the other.[31]

§ 147. **Allotments by chance.** It is not uncommon for a number of persons to contribute jointly to the purchase of property to be afterwards divided between them by some form of allotment depending upon chance. Now it is quite proper for persons to agree to purchase land to be afterwards divided and distributed among them in such manner as they may thereafter agree upon,[32] but if such contract subsequently becomes tainted by the vice of a lottery, then, notwithstanding its innocent inception, the entire agreement becomes invalid and unenforceable,[33] while if the original agreement is for a purchase and distribution by drawings or chance allotments it is void from the beginning.[34]

§ 148. **Sunday contracts.** Probably no proposition of law is more widely known or generally accepted than that contained

acts in aid of the unlawful purpose, though slight, are sufficient. Fisher v. Lord, 63 N. H. 514.

[28] Kattwitz v. Alexander, 34 Tex. 689; Chandler v. Johnson, 39 Ga. 85; Saratoga Bank v. King, 44 N. Y. 87; Clements v. Morston, 52 N. H. 31; Fuller v. Reed, 38 Cal. 99. As where A. agreed to sell B. for a gross sum a lot and building and a quantity of liquor. The sale of the liquor would have been illegal. *Held*, that the contract being indivisible, a suit for a specific performance could not be based upon it. Gerlach v. Skinner, 34 Kan. 86.

[29] Hanauer v. Gray, 25 Ark. 350; Clements v. Morston, 52 N. H. 31.

[30] Saratoga Bank v. King, 44 N. Y. 87.

[31] Erie R'y Co. v. Express Co. 35 N. J. L. 240.

[32] Emshwiler v. Tyner, 21 Ind. App. 347.

[33] Emshwiler v. Tyner, 21 Ind. App. 347; Rothrock v. Perkinson, 61 Ind. 39.

[34] Branham v. Stallings, 21 Colo. 211; Den v. Shotwell, 23 N. J. L. 470; and see Dunn v. People, 40 Ill. 465; Thacher v. Morris, 11 N. Y. 437.

in the oft-repeated statement, "a contract made on Sunday is void." It is one of the first legal rules taught to the student, and from frequent and long-continued iteration has become a fixed fact in the mind of every layman. A long series of judicial decisions give stability to the proposition,[35] and it has generally come to be considered as an unassailable, unbending and impregnable rule. And yet, a contract made upon Sunday is not void at common law,[36] for by that law Sunday differed from no other day except that it was *dies non juridicus*.[37] The doctrine that contracts made on Sunday are void depends, therefore, altogether on statutory enactments. Statutes relating to the observance of Sunday are in force in many of the states,[38] yet these statutes vary both in language and substance; and the decisions of the various courts, even though presenting an apparent uniformity, have nevertheless been based mainly on the phraseology of their own several statutes. The statutes in force in a majority of the states are based upon the English statute of 29 Car. II., ch. 257, which prohibited all "worldly labor, business or work on the Lord's day," excepting only work of charity and necessity. Where this statute has been re-enacted, either in terms or substan-

[35] Meader v. White, 66 Me. 90; Tucker v. West, 29 Ark. 386; Ryno v. Darby, 20 N. J. Eq. 231; Finn v. Donahue, 35 Conn. 216; Pate v. Wright, 30 Ind. 476; Sayre v. Wheeler, 32 Iowa, 559; Holcomb v. Donley, 51 Vt. 428; Stevens v. Wood, 127 Mass. 123; Ellis v. Hammond, 57 Ga. 179; Brimhall v. Van Campen, 8 Minn. 13.

[36] Horacek v. Keebler, 5 Neb. 355; Richmond v. Moore, 107 Ill. 429; and see the English cases, Comyns v. Bayer, Cro. Eliz. 485; Rex v. Brotherton, Strange, 702; King v. Whitnash, 7 B. & C. 596; Drury v. Defontaine, 1 Taunt. 136. In this case Lord Mansfield said: "It does not appear that the common law ever considered those contracts as void which were made on Sunday."

[37] Anciently, however, courts did sit on Sunday. The early Christians down to as late as the sixth century used all days alike for the hearing of causes, even Sunday itself; but in the year 517 a canon was promulgated exempting Sundays. Other canons were adopted in subsequent years, setting apart other days. These canons were all observed by the Saxon kings and through confirmation by William the Conqueror and Henry II. became a part of the common law of England. Not only was Sunday a nonjuridical day but the feast of the Ascension, of St. John the Baptist, the Purification of the B. V. M., and All Saints and All Souls days as well. See Swann v. Broome, 3 Burrow (Eng. K. B.), 1595.

[38] In a number of western states there are not and never have been any Sunday laws.

tially, the rule first stated will probably apply, and a contract executed on that day will be incapable of enforcement. But where the statute does not seek to enforce the performance of a religious duty, but simply to preserve the peace and good order of society by the prohibition of labor on Sunday, a contract entered into on that day would possess the same validity as one made upon a secular day; for the making of a contract is not common labor,[39] nor is it in derogation of a statute which does not in terms prohibit business as well as labor;[40] and generally, under statutes of the character just mentioned, a contract made on Sunday in matters of business other than such as prohibited by statute will be valid.[41]

But although contracts made upon Sunday may be illegal in the sense that no action based upon such contracts can be maintained either to enforce their obligations or to secure their fruits, they are not altogether inoperative. After they have been executed by the parties the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent the court from acting to relieve either party from the consequences of the transaction, the purpose, however, not being to validate the contract, but to deprive all the parties, they being *in pari delicto,* of all rights either of enforcement or relief.[42]

It is further a general rule of law that void contracts are not susceptible of ratification; but it has been held in numerous instances that contracts not otherwise obnoxious, but void only because made or executed on Sunday, form an exception to this general rule, and may be rendered valid and effec-

[39] Bloom v. Richards, 2 Ohio St. 387, in which it was held that, under a statute prohibiting labor, etc., entering into a contract for the sale of land was not, in the sense of the statute, common labor. To the same effect, Horacek v. Keebler, 5 Neb. 355; Richmond v. Moore, 107 Ill. 429; Sayles v. Smith, 12 Wend. (N. Y.) 57. Some courts construe the statute prohibiting "common labor" as an inhibition of every description of secular business not within the exceptions pointed out by the statute itself. See Love v. Wells, 25 Ind. 503; Allen v. Deming, 14 N. H. 133; Towle v. Larrabee, 26 Me. 464.

[40] Richmond v. Moore, 107 Ill. 429; Roberts v. Barnes, 127 Mo. 405.

[41] See Johnson v. Brown, 13 Kan. 529; Moore v. Murdock, 26 Cal. 514; Hellams v. Abercrombie, 15 S. C. 110; Kaufman v. Ham, 30 Mo. 387.

[42] Meyers v. Meinrath, 101 Mass. 336; Ellis v. Hammond, 57 Ga. 179.

tive by subsequent ratification.[43] Again, a deed takes effect only from the time of its delivery, and in many respects the same rule is applicable to contracts and agreements which precede conveyance. A deed may be dated, signed and even acknowledged on Sunday; but if not delivered until a subsequent day it is valid, whatever may be the effect upon the acknowledgment.[44]

§ 149. **Agreements to convey by will.** Ordinarily when a contract of sale is entered into the intention of the parties is that it shall be consummated by the delivery of a deed. But parties may stipulate for any kind of conveyance, and an almost unbroken line of precedents confirm the doctrine that one may make a valid agreement binding himself to make a particular disposition of his property by last will and testament, and that specific performance of such agreements will be decreed in all proper cases.[45]

The law permits every man to dispose of his own property at his own pleasure and in any manner best suited to himself; he may contract to convey by deed to be made at some future time or upon the happening of some contingency or event, and with equal propriety he may agree to perform the same duty by testamentary devise. It may not be wisdom for a man thus to embarrass himself as to the final disposition of his property. But with the wisdom or foolishness of men's contracts the law has no concern; it permits them to be the disposers of their own fortunes, and the sole and best judges as to the time and manner in which same shall be accomplished. If, therefore, such an agreement is free from fraud or undue influence and made upon a sufficient consideration, it may be valid, and, if otherwise unobjectionable, will be enforced by compelling a conveyance from the heirs of the promisor or purchasers with notice from him in his life-time.[46]

[43] Banks v. Werts, 13 Ind. 203; Adams v. Gay, 19 Vt. 353.

[44] Love v. Wells, 25 Ind. 503. It has been held that the fact that the acknowledgment was taken on Sunday neither impairs nor strengthens the integrity of the instrument. See Roberts v. Barnes, 127 Mo. 405.

[45] Gupton v. Gupton, 47 Mo. 37; Wright v. Wright, 31 Mich. 380; Logan v. McGinnis, 12 Pa. St. 27; Parsell v. Stryker, 41 N. Y. 480; Maddox v. Rowe, 23 Ga. 431; Carmichael v. Carmichael, 72 Mich. 76.

[46] Parsell v. Stryker, 41 N. Y. 480.

§ 150. **Contracts procured by fraud.** Where a contract has been entered into through the fraudulent artifice of another, such contract is not *ipso facto* void. It is voidable only, and may become void at the election of the defrauded party. Should he decide to treat it as valid it will have the same effect and be governed by the same rules as other contracts. If a party to such a contract desires to avail himself of its invalidity, he must not only disaffirm the same at the earliest practical moment after discovery of the fraud that has been practiced upon him, but return or offer to return all that has been received under it. He cannot, with knowledge of the fraud, take any benefit under the contract, or change the condition of the property, and then repudiate the contract; for the taking of a benefit is an election to ratify it. He has the option to affirm or disaffirm, but he cannot do both.[47]

§ 151. **Ante-nuptial contracts.** Executory agreements made between a man and a woman who afterwards marry, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, during coverture or after death, are among the generally-recognized yet unfamiliar forms of land contracts. Such agreements were treated as void at common law; but equity, in the application of its conscientious principles, has ever regarded them as valid and binding and capable of enforcement against either at the suit of the other. They are now usually provided for by statute, and, like dower, are favored by the courts and enforced according to the intention of the parties whenever the contingency provided by the contract arises.

No special formality is requisite in such instruments;[48] and, in order to effectuate the intention of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree their specific performance, and when such relief is inadequate or impracticable from the situation of the property

[47] Masson v. Bovet, 1 Denio (N. Y.), 69; Cobb v. Hatfield, 46 N. Y. 533.

[48] An ante-nuptial contract may be established by letters between the parties written before marriage. Peck v. Vandemark, 99 N. Y. 29.

or the character of the contract, will award damages for its breach.[49]

§ 152. **Post-nuptial contracts.** At common law a married woman was not allowed to possess property independent of her husband; and, as the law regarded husband and wife as but one person, it did not permit them to change their relations by entering into a contract between themselves. But in equity a wife is permitted to enter into a contract with her husband, for a valuable consideration, for the transfer of property from him to her; and courts will enforce the provisions of the same where any meritorious purpose is involved.[50]

Since the passage of the statute now in force in nearly every state removing common-law restrictions and destroying the common-law unity of person, married women may contract with their husbands, even at law; and contracts so made will for most purposes be regarded and treated in the same light as contracts between other persons.[51]

[49] Peck v. Vandemark, 99 N. Y. 29; Johnson v. Spicer, 107 N. Y. 185. Upon the principle that, where a person acts for a valuable consideration, as upon marriage, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he is able; and whenever this is the case there is nothing in any of the authorities to raise a doubt that it shall have effect so far as the person executing it has the power; and where the nature of the instrument is contrary to what the person prescribes, but demonstrates an intent to charge, it shall have the operation of charging in that form which the power allows. It follows, therefore, that however the intent be shown, if it be in writing the court will, in aid of the intention, supply the defects in the mode of execution in favor of the jointress; so that whether the intent to execute the power be by letter, memorandum, will, articles or covenant, a court of equity will aid the jointress, and supply all omissions. Bright on Husband and Wife, 471.

[50] Livingstone v. Livingstone, 2 Johns. Ch. (N. Y.) 537; Garlick v. Strong, 3 Paige (N. Y.), 440.

[51] See § 71, 72, *ante*.

Article II. As Affected by the Statute of Frauds.

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§ 153. General effect of statute. As a general rule, a contract void by the statute of frauds is void for all purposes; it confers no rights and creates no obligations as between the parties to it, and no claim can be founded upon it as against third persons. It is incapable of enforcement, either directly or indirectly.[1] It cannot be made effectual by estoppel, merely because it has been acted upon by one of the parties and not performed by the other,[2] for there is no exception contained in the statute, and courts have no right to create any;[3] and where the contract is entire, and one part is void for non-compliance with the statute, the whole is void.[4]

But contracts within the statute of frauds are not illegal unless evidenced by a writing. Their invalidity results from a

[1] Dung v. Parker, 32 N. Y. 492.

[2] Brightman v. Hicks, 108 Mass. 246; Wheeler v. Frankenthal, 78 Ill. 124; McElroy v. Ludlum, 32 N. J. Eq. 828.

[3] Hairston v. Jaudon, 42 Miss. 380.

[4] Fuller v. Reed, 38 Cal. 99; Hobbs v. Wetherwax, 38 How. Pr. (N. Y.) 385. A part performance of a contract void by the statute of frauds may render it binding and valid as far as that extends; but it can have no effect upon any remaining stipulations, still remaining executory. As to those the statute remains operative, declaring them void; for if the power existed to maintain an action for the non-performance of one portion of a contract void by the statute, it is difficult to see what would stand in the way of allowing the same thing to be done where an

non-compliance with prescribed methods of proof, and they are invalid only to the extent that they may not be enforced against a defendant without writing—an immunity which the defendant may waive. If the defendant does not see fit to avail himself of the protection thus afforded, or through inadvertence or neglect fails to properly object to testimony of parol agreements when offered, he will be held to have waived such right after the testimony has been closed, and cannot be heard to complain that the agreement was void by reason of the statute of frauds.[5] So, also, a parol contract required to be in writing by the statute, if treated as obligatory by the parties until it is executed, is not void;[6] nor does the statute restrict parties from the voluntary performance of their parol engagements.

Such is the effect of the statute at law. In equity the rules last stated have been infringed, and in cases of part performance a contract void at law has been permitted to have effect where a denial of such relief would manifestly tend to encourage fraud. The wisdom of the innovation has often been doubted, but the practice is now too well established to be attacked. This phase of the subject will be fully considered in treating upon the equitable remedies of the parties, and need not be further alluded to here.

§ 154. Conflict of laws. As a general rule, a contract valid in the state where it is executed may be enforced elsewhere, under the general comity which prevails between the states.[7] So, on the other hand, an agreement void or voidable by the statute of frauds of the state in which it was made cannot be enforced in another state, notwithstanding that had it been made in the latter state it would have been valid and enforceable therein.[8]

§ 155. Entire contract, void in part. The rule is that where a contract is entire, and one part is void for non-compliance

entire omission to perform might be shown by the evidence. Weir v. Hill, 2 Lans. (N. Y.) 278.

[5] Montgomery v. Edwards, 46 Vt. 151.

[6] Wheeler v. Frankenthal, 78 Ill. 124; Aicardi v. Craig, 42 Ala. 311.

[7] Roundtree v. Baker, 52 Ill. 241.

[8] Cochran v. Ward, 5 Ind. App. 89; Buckley v. Humason, 50 Minn. 195; Holderman v. Pond, 45 Kan. 410.

with the statute of frauds, the whole is void.[9] And this rule seems to be without exceptions.[10]

§ 156. **Defense of the statute—By whom available.** The defense of the statute of frauds is personal, and can only be relied on by the parties or their privies.[11] Strangers to the transaction cannot impeach it by showing that it is void for statutory non-compliance,[12] and the parties may waive the defense at their pleasure.[13]

§ 157. **What contracts must be in writing.** The statute in general terms provides that no action shall be brought to charge any person upon any contract for the sale of lands, or any interest in or concerning them, unless such contract shall be evidenced by a writing; and this general statement has been the subject of much comment, fine drawn distinctions, and not a little inharmonious decision. The interest thus provided for extends to cover every species of claim from the full legal title to the faintest equity,[14] while the rule applies to all

[9] As where R. orally agreed with F. to give him a certain portion of the purchase money, and also a certain parcel of land for his services in effecting the sale of R.'s land, but no memorandum was made of the promise; *held*, that the whole contract was void, and no action would lie either for the money or the land. Fuller v. Reed, 38 Cal. 99. And so where a verbal agreement was made for the transfer of a farm, and it was also agreed that the wheat growing on the farm should be transferred, *held*, the former agreement being void for want of a writing, the latter being connected with it, was also void, though otherwise it might not have been. Jackson v. Evans, 44 Mich. 510; Clark v. Davidson, 53 Wis. 317; Becker v. Mason, 30 Kan. 697.

[10] Meyers v. Schemp, 67 Ill. 469.

[11] Chicago Dock Co. v. Kinzie, 49 Ill. 289.

[12] Richards v. Cunningham, 10 Neb. 417; Davis v. Inscoe, 84 N. C. 396.

[13] Montgomery v. Edwards, 46 Vt. 151.

[14] Holmes v. Holmes, 86 N. C. 205; Lillie v. Dunbar, 62 Wis. 198; Richards v. Richards, 9 Gray, (Mass.), 313. The sale of an equity of redemption is within the statute. Scott v. McFarland, 13 Mass. 309—an agreement for the release of dower by widow; Shotwell v. Sedam, 3 Ohio, 5; Gordon v. Gordon, 56 N. H. 170; Wright v. De Groff, 14 Mich. 164—an agreement to transfer a mining claim; Copper Hill Mining Co. v. Spencer, 25 Cal. 18—an agreement for the assignment of an executory land contract; Smith v. Burnham, 3 Sumn. (C. Ct.) 435—an agreement for the transfer of a lease; Kingsley v. Siebrecht, 92 Me. 23.

parties who assume to act, whether on their own behalf or on behalf of another.[15]

An interest in contingent profits arising from a sale of real estate to be made thereafter does not amount to an interest in the land itself within the meaning of the statute;[16] and the same is true generally of agreements for the payment of money based upon the future sales or purchases of property.[17] But even contracts for the payment of money only may and often do involve, directly or indirectly, some estate or interest in land; and when such is the case, such promises must be evidenced by writing, notwithstanding that they do not profess to be for the sale or conveyance of land.[18]

§ 158. Incorporeal hereditaments. An easement, license or privilege may be, and often is, such an interest in land as is contemplated by the statute; and, unless the grant of same is

[15] A contract to procure the conveyance of an equity held by a third person is within the statute of frauds as a contract for the sale of an interest in lands, and is void if not in writing. Rawdon v. Dodge, 40 Mich. 697. An agreement with a debtor to purchase his land at execution sale, and then convey it to him, is within the statute. Harrison v. Bailey, 14 S. C. 334. And see Rucker v. Steeleman, 73 Ind. 396; Bauman v. Holzhausen, 26 Hun (N. Y.), 505. A parol agreement to accept a conveyance in trust, and to reconvey to the *cestui*, is within the statute, and cannot be shown by parol. McClain v. McClain, 57 Iowa, 167. So also of an oral contract under which one is to buy land at a public auction on joint account of himself and others. Parsons v. Phelan, 134 Mass. 109. So of an agreement to procure a relinquishment of a wife's dower. Martin v. Wharton, 38 Ala. 637.

[16] Benjamin v. Zell, 100 Pa. St. 33; Babcock v. Reed, 50 N. Y. Sup. Ct. 126.

[17] As where A. promised to pay B. $100 if the latter would buy C.'s land, which B. thereupon bought, it was *held*, in a suit to recover the $100, that the contract was not within the statute of frauds, either as relating to land or as a promise to pay the debt of another. Little v. McCarter, 89 N. C. 233. A parol agreement to buy a mortgage on A.'s land, sell the premises for his benefit and account for the balance over disbursements is not within the statute. McGinnis v. Cook, 57 Vt. 36. And see Mahagan v. Mead, 63 N. H. 130.

[18] Thus, a promise to pay a sum of money as a compensation to the plaintiff for the injury done him by the misconduct of the defendant in obtaining a patent in his own name for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the

evidenced by a writing in conformity to the statute, it will be unavailing to establish any legal right in the licensee. It is true that a license, in the usual and ordinary acceptation of the term, is simply an authority given to do some one act or series of acts on the land of another without passing any estate in such land; but licenses may sometimes practically amount to the granting of an estate, and when such is the case they are regarded in the light of leases, which, to be effectual, must be by deed.[19] The distinction will readily be seen. Licenses to do a particular act do not in any degree trench upon the policy of the law, which requires that bargains respecting the title of or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass; but a permanent right to hold another's land for a particular purpose, with a right to enter upon it at all times, or where any interest greater than a mere temporary occupation is created, while it does not extend to the land itself, it is nevertheless a right annexed to such land, which can only pass by grant. No such interest can be assigned or granted without writing, according to the express provisions of the statute of frauds,[20] and contracts for the sale or future creation of such rights are subject to the same condition.

§ 159. **License to flood lands.** The right to flood the land of another, whether from the dripping from the roof of a building, the diversion of a water-course, or otherwise, is an interest in land; and a parol license or agreement giving such right is within the statute of frauds and void. Such a license

sale of land within the statute of frauds, and must be in writing. Hughes v. Moore, 7 Cranch (U. S.), 176. In this case the learned judges construed the contract to import a sale of land by the plaintiff, and that the sum of money stipulated to be paid was, in contemplation of the parties, to extinguish the title of the said plaintiff.

[19] Cook v. Stearns, 11 Mass. 536; Mumford v. Whitney, 15 Wend. (N. Y.) 380. Thus, the conferring of a right to enter upon lands and to erect and maintain a dam as long as there shall be employment for the water-power thus created is more than a simple license. It is the transfer of an interest in lands, and to be valid must be in writing. Id.

[20] Thompson v. Gregory, 4 Johns. (N. Y.) 81; Mumford v. Whitney, 15 Wend. (N. Y.) 380.

is revocable at any time.[21] The interest created by such a license is a freehold interest by way of easement in the land flowed, which can pass only by deed.[22]

§ 160. **License for right of way.** A verbal license for a right of way over lands is obnoxious to the statute and revocable at any time.[23]

§ 161. **The produce of land.** Owing to the conflict in the adjudged cases in regard to the interpretation of contracts for the sale of crops and the natural produce growing upon land, it is difficult to deduce therefrom any clearly-defined rule upon the subject. A marked distinction has always been made between contracts for the natural product of land, technically termed *prima vestura,* as trees, grass or other spontaneous growth, and such as relate only to crops raised by the industry of man by planting and cultivation, called *fructus industriales.* A further distinction is also made between the natural product when severed by the vendor or purchaser. As a general proposition, all of the produce of the earth, whether of spontaneous growth, as trees, grass, etc., or crops raised periodically and by cultivation, as grain, vegetables, etc., are part of the soil before severance; and for this reason it has been held that agreements vesting an interest in them in the purchaser before severance must, to be effective, be expressed in writing.[24] But in this respect the authorities are not harmonious. It has been contended, and with much apparent reason, that there is nothing in the products of the earth which is an interest in or concerning land when severed from the soil. If, therefore, such products are sold specifically, and by the terms of the contract are to be separately delivered as chattels, such sale cannot be held to be an interest in land, and would not be affected by the terms of the statute.[25] The circumstance that the produce may or probably or certainly will derive nourishment from the soil between the time of the contract and the time of delivery is not conclusive as to the operation of the statute; and the test seems to be that if the contract, when executed,

[21] Tanner v. Valentine, 75 Ill. 624.

[22] Mumford v. Whitney, 15 Wend. (N. Y.) 380.

[23] Forbes v. Balenseifer, 74 Ill. 183.

[24] Kerr v. Hill, 27 W. Va. 576.

[25] See Purner v. Piercy, 40 Md. 212; Graff v. Fitch, 58 Ill. 377; Marshall v. Ferguson, 23 Cal. 69.

is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but, if the contract is, in the *interim,* to confer upon the purchaser an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is affected by the statute and must be in writing, although the purchaser is at last to take from the land only a chattel.

§ 162. **Standing trees.** Upon this subject there is a very decided conflict of authority. A large number of apparently well-considered decisions hold that a contract for the sale of trees growing upon land is within the statute of frauds, as comprehending a sale of land, "or some interest therein;"[26] and hence, to be operative or enforceable, must be in writing.[27] Under these decisions standing trees are regarded as a part of the land in which they are rooted, and from which they draw their support, and that being thus impressed with the character of real property they fall strictly within the letter as well as the spirit of the statute.[28] On the other hand, there are not wanting authorities which sustain the doctrine that where timber or produce of land, or other thing annexed to the freehold, is sold specifically, whether it is to be taken by the vendee under a special license to enter for that purpose, or whether it is to be severed from the soil by the vendor, in the contemplation of the parties it is still substantially a sale of chattels only.[29] It cannot be doubted that, in every sale of this description, such is the intention of the parties; and the

[26] The term "land" embraces not only the soil but its natural produce growing upon it and affixed to it, all of which pass by a grant of it. Harrell v. Miller, 35 Miss. 700; Kingsley v. Holbrook, 45 N. H. 313.

[27] Owens v. Lewis, 46 Ind. 488; Russell v. Meyers, 32 Mich. 522; Kingsley v. Holbrook, 45 N. H. 313; Buck v. Pickwell, 27 Vt. 164; Harrell v. Miller, 35 Miss. 700; Jenkins v. Lykes, 19 Fla. 148; Slocum v. Seymour, 36 N. J. L. 139; Killmore v. Howlett, 48 N. Y. 569; Yeakle v. Jacob, 33 Pa. St. 376; Knox v. Haralson, 2 Tenn. Ch. 232; Westbrook v. Eager, 16 N. J. L. 81; Cool v. Lumber Co. 87 Ind. 531; Daniels v. Bailey, 43 Wis. 566; Williams v. Flood, 63 Mich. 487.

[28] Kingsley v. Holbrook, 45 N. H. 313; Buck v. Pickwell, 27 Vt. 157; Yeakle v. Jacob, 33 Pa. St. 376; Hirth v. Graham, 50 Ohio St. 57; Lillie v. Dunbar, 62 Wis. 198.

[29] Smith v. Bryan, 5 Md. 141; Cain v. McGuire, 13 B. Mon. (Ky.) 340; Cutter v. Pope, 13 Me. 377; Killmore v. Howlett, 48 N. H. 569; Carpenter v. Medford, 99 N. C. 495; Fish v. Capwell, 18 R. I. 667; Green v. R. R. Co. 73 N. C. 524. In this

only question that arises is, whether by the principles of law such intention can be effectuated.

The question has assumed many phases and has received many different interpretations. Thus, it has been held that a sale of standing timber, in writing, by the owner of the fee in the land, has the effect in law to sever the trees from the land, and that they then become personal chattels without any actual severance; that, after such constructive or legal severance by the original sale, they may be conveyed like any other personal property by parol;[30] and that, when such conveyance by the owner of the fee does not limit the time for the entry of the grantee upon the land to cut and remove the trees, a right of entry passes for an indefinite but reasonable time. Here, therefore, there would seem to be a recognition of the principle that growing trees may be the subject of an ownership distinct from the ownership of the soil, and that, under the circumstances stated, they are no longer deemed as annexed to the realty, but as entirely abstracted or divided therefrom, and, hence, may be treated the same as other personal chattels which are the annual produce of labor and of the cultivation of the earth.[31] While the timber remains standing it is certainly an integral part of the realty, and until severed, either actually or constructively, remains the property of the owner of the soil; but, it is contended, it is doing no violence to established legal principles to construe such contracts as passing an interest in the trees when severed from the freehold;[32] while it is well settled that a license to enter on the land of another and do a particular act or series of acts may be valid, although not granted by deed or in writing.[33] If such a license be not revoked before the trees are severed the title in the property will become absolute in the vendee, and the license, being

case the wood had been cut and carried away, and the action was brought for the price.

[30] See Carpenter v. Medford, 99 N. C. 495.

[31] See Warren v. Leland, 2 Barb. (N. Y.) 613; Cudworth v. Scott, 41 N. H. 456.

[32] White v. Foster, 102 Mass. 378. Such agreements may be regarded as executory contracts for the sale of chattels as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal. Poor v. Oakman, 104 Mass. 316; Jenkins v. Sykes, 19 Fla. 148; Yale v. Seeley, 15 Vt. 221.

[33] Hill v. Cutting, 107 Mass. 597; Sterling v. Baldwin, 42 Vt. 306.

coupled with an interest, will then be irrevocable, giving to the vendee a perfect right to enter and remove the trees thus severed; but if, before the trees are severed, the vendor should revoke such license, no title under this line of decisions would pass to the vendee and no rights would vest by virtue of such contract.[34] It will be seen, therefore, in this view of the case, that, notwithstanding a parol sale of timber may be void as a sale of an interest in land, it may nevertheless still be permitted to operate as a license to enter, cut and carry away the trees; and, if executed by cutting, the timber will be converted into personalty and the title thereto will vest in the person acting under the license, he having complied with all the conditions under which the same was granted.[35]

The cases which unqualifiedly hold that a sale of growing trees is a sale of chattels only are very few,[36] and are mainly based upon the fact that such sales were made in prospect of immediate separation from the land—the idea being that the trees sold would, on account of their immediate removal, derive no benefit from the soil.

The general rule, however, and the one which seems to be sustained by the volume of authority, is as first stated; that is, that a sale of growing or standing timber is a contract concerning an interest in land, and, hence, within the inhibition of the statute, and it may be said further, that this rule is sustained by all the analogies of law. As between debtor and creditor the rule is well established that trees are a part of the realty, and may not be reached by execution against chattels; so in the case of an heir, they descend with the land; so as to a vendee, they pass with a sale of the land without special mention. And it may further be said, that, in a matter of this kind, a sale does not depend upon the intention of the parties, but upon the legal character of the subject of the contract. It is also well settled that standing timber is an interest in lands that may be acquired by deed, and the fact

[34] Owens v. Lewis, 46 Ind. 488; Poor v. Oakman, 104 Mass. 316; Delaney v. Root, 99 Mass. 546.

[35] Jenkins v. Lykes, 19 Fla. 148; Pratt v. Ogden, 34 N. Y. 23; Yale v. Seeley, 15 Vt. 221; Poor v. Oakman, 104 Mass. 316. And see Huff v. McCauley, 53 Pa. St. 210; Howe v. Batchelder, 49 N. H. 204.

[36] See Byasse v. Reese, 4 Met. (Ky.) 372; Erskine v. Plummer, 7 Me. 447; Purner v. Piercy, 40 Md. 212.

that same must be removed within a definite period does not prevent the vesting of title.[37]

§ 163. Growing crops. That growing crops are a part of the freehold and pass with the land upon which they stand is a proposition settled beyond dispute;[38] and the rule as stated by the earlier writers is that in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have the right to the soil for a time for the purposes of further growth and profit of that which is the subject of sale, it is an interest in land within the meaning of the statute of frauds, and must be proved by writing; but when the thing is sold in prospect of separation from the soil, immediately or within a convenient and reasonable time, without any stipulation for the beneficial use of the soil, and with but a mere license to enter and take away, it is to be regarded substantially as a sale of goods, and so not within the statute; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land.[39] Later decisions have not been in strict accord with this old rule; and while in some states it is substantially recognized and adopted, in others it has been expressly denied. In view of the American authorities on this subject no satisfactory rule can be framed that shall have a general application; but the test, in most cases, will depend upon the terms of sale with reference to the right of the purchaser to use the land, either for the purpose of further cultivation or possibly for the harvesting of the crop.[40] The tendency of the authorities, however, is to regard all contracts for the sale of natural produce, in place, as a sale of an interest in land;[41] while cultivated crops, or such as come within the meaning of the term

[37] Johnson v. Moore, 28 Mich. 3; Mae v. Benedict, 98 Mich. 260; Magnetic Ore Co. v. Lumber Co., 104 Ala. 465.

[38] Kerr v. Hill, 27 W. Va. 576.

[39] Purner v. Piercy, 40 Md. 212; Graff v. Fitch, 58 Ill. 377.

[40] Consult Sterling v. Baldwin, 42 Vt. 306; Whitmarsh v. Walker, 1 Met. (Mass.) 313; Giles v. Simmonds, 15 Gray (Mass.), 441; Poor v. Oakman, 104 Mass. 309.

[41] Thus, wild grass growing on unoccupied, uncultivated, land is part of the realty, and an attempt to transfer it by a parol grant is void. Powers v. Clarkson, 17 Kan. 218.

fructus industriales, as sales of goods only—the former to be evidenced by a writing, while the latter may rest in parol.[42]

§ 164. **Ruined walls and buildings.** Complete or unfinished structures of any kind, where the annexation is of a permanent character, are properly considered as forming part of the realty so long as the materials of which they are composed remain in place. That the original building has been destroyed by fire or other casualty does not alter the rule or afford room for a different construction. The materials of which a building is composed will, so far as they may become severed by fire, become personalty, and may properly be the subject of a valid contract by parol; yet where walls remain standing, even though dilapidated and in ruins, they do not lose their essential character as realty, and contracts relating to them are for interests in land, which, under the statute, must be in writing. Hence, a contract for the sale of the debris and refuse left by a fire, while valid if relating only to the fallen and detached portions, would be incapable of enforcement as to the standing walls unless in writing; and although part of the subject-matter might have been personalty, yet, if the contract embraced realty as well, it must be regarded as entire and governed by the statute of frauds.[43]

§ 165. **Buildings to be removed.** The sale of a building with the right of removal is not necessarily a sale of an interest in lands within the meaning of the statute of frauds; and if the effect of the contract of the parties is to impress upon the structure the character of personalty, it will ordinarily

[42] Sterling v. Baldwin, 42 Vt. 306; Howe v. Batchelder, 49 N. H. 204; Slocum v. Seymour, 36 N. J. L. 138; Owens v. Lewis, 46 Ind. 488. An oral agreement for the sale of mulberry trees growing in a nursery, and raised to be sold and transplanted, to be delivered on the ground where they are growing, upon payment therefor being made, is not a contract for the sale of an interest in or concerning lands, etc., within the statute of frauds. Whitmarsh v. Walker, 1 Met. (Mass.) 313.

[43] Thayer v. Rock, 13 Wend. (N. Y.) 53. Where a building was burned, and the owner afterwards verbally sold the bricks, some of which had been severed by the fire, but the greater part remaining in the walls, it was held that the brick in the walls was realty, and the sale being an entirety was within the statute of frauds. Meyers v. Schemp, 67 Ill. 469.

be permitted to take that character.[44] If the structure is sold to remain on the land, unless of a very slight and unsubstantial character, this would without doubt be a sale of an interest in land within the statute. Certainly such would be the case if the sale is made by the owner, although it might be otherwise if made by a tenant or licensee. But where the owner sells a building with the right of removal, he severs it from the land and gives it the character of personalty; and in impressing this character upon it, he takes it without the statute as effectually as if he had torn it down and sold the materials of which it was composed.[45] In view, however, of the subject discussed in the last paragraph the question is one of doubt, particularly when the building is erected on foundations which penetrate the soil and virtually form a part of the land.[46]

§ 166. **Partition fence.** The general rules which regulate the holding and transmission of land apply with the same force and effect to any and all interests therein, however small and insignificant they may appear. For this reason it would seem that even a contract for the conveyance of an undivided interest in a partition fence between lands of adjoining owners, must, to satisfy the statute of frauds, be in writing.[47] Such an agreement is to be regarded as a contract for the release of an interest in realty, and although but an inconsequential easement is involved, it nevertheless cannot be reserved by parol.

§ 167. **Parol reservations.** In sales of improved property it is no uncommon thing to make a verbal arrangement con-

[44] Rogers v. Cox, 96 Ind. 157; Keyser v. School District, 35 N. H. 477; Ham v. Kandall, 111 Mass. 297; Pullen v. Bell, 40 Me. 314; Coleman v. Lewis, 27 Pa. St. 291.

[45] Rogers v. Cox, 96 Ind. 157. In this case it did not appear that the building was permanently annexed to the land, and the court refused to decide what would be the rule in case it had been, but at the same time strongly intimating that it might still be the subject of a valid verbal contract of sale. And see Long v. White, 42 Ohio St. 59, where a verbal contract for the sale and delivery of a house then affixed to the realty, but afterward severed and delivered on rollers, was held not within the statute of frauds.

[46] See also the cases sustaining the doctrine of the succeeding paragraph.

[47] Rudisill v. Cross, 54 Ark. 519; Knox v. Tucker, 48 Me. 373; and see Kellogg v. Robinson, 6 Vt. 276.

temporaneous with the written contract, whereby a reservation is made, or attempted to be made, of trees, shrubbery, buildings and other artificial objects upon the property. It seems almost unnecessary to repeat here what has been fully discussed in this and other chapters of the work relative to the character of annexations and accretions to land, as well as the utter inadmissibility of contemporaneous verbal agreements to impair the effect of a written contract, which the parties in executing are deemed to have deliberately made the exclusive evidence of the terms of their agreement. The positive rules of law forbid any such showing; and where the contract is efficient to pass the land, trees, shrubs, buildings, etc., are considered as annexed to it and pass by a sale of the soil.[48]

§ 168. **Agreements for exchange.** A contract for the exchange of lands is as much within the statute of frauds as a contract for their sale.[49] The statute which requires such contract to be in writing is equally binding on courts of equity as courts of law; and while courts of equity have, in many instances, relaxed the rigid requirements of the statute for the purpose of hindering the statute made to prevent frauds from becoming the instrument of fraud, it will never do so in the case of an agreement for exchange, unless there has been a part performance or delivery of possession made in pursuance of a prior contract conclusively proved.[50] Where there has been no part execution on either side, nor anything but a breach of promise, relief will not be granted.

§ 169. **Collateral agreements.** While the tendency of courts is to increase rather than relax the stringency of the statute in its practical application, and to insist upon the rule which forbids the introduction of parol testimony to limit, impair or otherwise affect the operation of written contracts, yet in the matter of contemporaneous or subsequent agreements collateral to and growing out of the principal contract, when they do not tend to contradict or impeach such contract, a marked

[48] A parol reservation of ornamental shrubbery *held* invalid. Smith v. Price, 39 Ill. 28. A parol reservation of a barn and sheds from the operation of a deed is void under the statute of frauds. R. R. Co. v. Forbes, 30 Mich. 165; and see Rudisill v. Cross, 54 Ark. 519.

[49] Purcell v. Coleman, 4 Wall. (U. S.) 513.

[50] Purcell v. Coleman, 4 Wall. (U. S.) 513.

liberality is noticeable. Where such collateral agreements do not profess to be for the conveyance of any interest in the land, notwithstanding they may be directly referable to it, they are permitted to rest in parol, and oral testimony will be received to establish them. Thus, an agreement between the parties to a previously-made contract for the sale of lands, that if, upon a survey, the tract proves larger than is called for by the contract, the purchaser shall pay an increased price, need not be in writing, as it is not a contract for the sale of lands, and hence not within the statute;[51] and so of all contracts and agreements made with reference to a previous contract, but not in derogation of its terms or calculated to impair its operation.[52]

Collateral agreements made contemporaneously with the principal agreement, and with reference thereto, stand on the same ground as subsequent agreements and are governed by the same rules.[53]

§ 170. Partnership agreements for dealing in lands. Upon the question as to whether a partnership for the purpose of dealing in real estate can be proved by parol there is considerable conflict of authority. On the one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds, which provides that no estate or interest in lands shall be created, assigned or declared, unless by act

[51] McConnell v. Brayner, 63 Mo. 461; Sherrill v. Hagan, 92 N. C. 345.

[52] An agreement between the grantor of lands and his grantee that the latter, in consideration of the conveyance, shall support the former for life, is not within the statute of frauds, but may be oral. Harper v. Harper, 57 Ind. 547. Nor is a contract by a son with his father that, in consideration of a conveyance to him by the father, he will release to his brothers and sisters all claim in expectancy to the residue of the father's estate. Galbraith v. McLain, 84 Ill. 379. Agreements settling doubtful boundaries may be valid and obligatory though not in writing. Betts v. Brown, 3 Mo. App. 20; Ambler v. Cox, 20 N. Y. Sup. Ct. 295.

[53] A grantee, before accepting the end of an ungraded lot in a city, said to the grantor: "You have to pay for the filling in;" to which the grantor replied, "All right, I will pay it." In an action by the grantee to recover from the grantor the amount of an assessment subsequently laid for the filling, and paid by the plaintiff, *held*, that the defendant was liable, as on a valid independent agreement, to pay any assessment for filling which the municipal authorities might lay upon the lot. McCormick v. Cheevers, 124 Mass, 262.

or operation of law or by deed of conveyance in writing.[54] On the other hand it is contended that such an agreement is not affected by the statute, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership.[55] It would seem, however, that a distinction should be made between agreements by two or more to purchase lands for their joint benefit and a partnership agreement for dealing in lands. The former is within the statute, while the latter has frequently been held to be unaffected by it.[56] And while the subject is somewhat unsettled the prevailing opinion would seem to be that partnership agreements do not come within the meaning of the statute, since neither conveys or assigns any land to the other; that, as between the partnership and its vendors or vendees, in the sale or purchase of lands, the statute in all cases would operate; but as between the partners themselves, when they are neither vendors nor vendees of one another, it would not affect their agreements.[57]

In like manner an oral agreement whereby one is to negotiate the purchase of land, and the other is to pay the price and take the title, and, when the latter shall sell, the profits to be divided between them, is not within the statute of frauds,[58] as it does not contemplate that the negotiator shall have any estate or interest in the land or be interested in any way in the transaction, unless upon a sale there should be a profit,

[54] See Smith v. Burnham, 3 Sumner (C. Ct.), 435. An agreement by parol, under which one is to buy land at public auction on the joint account of himself and another, *held* to be within the statute of frauds. Parsons v. Phelan, 134 Mass. 109. A parol agreement of partnership for the purchase of standing timber, *held*, void. Seymour v. Cushing, 100 Wis. 580.

[55] Bunnell v. Taintor, 4 Conn. 568; Richards v. Grinnell, 63 Iowa, 44; Patterson v. Wone, 10 Ala. 444.

[56] See Speyer v. Desjardins, 144 Ill. 641.

[57] Chester v. Dickerson, 54 N. Y. 1; Holmes v. McCray, 51 Ind. 358; and see Personette v. Pryme, 34 N. J. Eq. 26; Everhart's Appeal, 106 Pa. St. 349; Babcock v. Read, 99 N. Y. 609; Richards v. Grinnell, 63 Iowa, 44; Gibbons v. Bell, 45 Tex. 417; Hodge v. Twitchell, 33 Minn. 391; Speyer v. Desjardins, 144 Ill. 641; Bates v. Babcock, 95 Cal. 479.

[58] Snyder v. Wolford, 33 Minn. 175; Benjamin v. Zell, 100 Pa. St. 33; Heyn v. Philips, 37 Cal. 529; Gwaltney v. Wheeler, 26 Ind. 415; Lesly v. Rasson, 39 Miss. 368; Bruce v. Hastings, 41 Vt. 380; Trowbridge v. Wetherbee, 11 Allen (Mass.), 361; Treat v. Hiles, 68 Wis. 344.

and then only in the profit. Such an agreement is rather one of employment or agency than for an interest in land. Nor will any trust exist in respect to the profits other than such as arises upon the receipt by one of money which he has agreed to pay on such receipt to another.[59] So, also, a contract by which parties agree to acquire land together, one furnishing the certificate and the other the labor and expense of surveying and procuring a patent for it, is not a contract for the purchase and sale of lands within the provisions of the statute of frauds.[60] An agreement between two persons, by which one is to purchase land on the joint account of both, and each party is to contribute a moiety of the purchase money, and the title is to be made to both as tenants in common, has been held not to be within the statute of frauds, and, hence, valid though not in writing.[61]

It is important, however, that the integrity of the statute shall be preserved; and generally where by the terms of the agreement a transfer of land is contemplated, whether the title to the same shall be vested in one of the parties to such agreement or in a stranger, it is a contract for the sale of an interest in land, and within the words and policy of the statute.[62]

§ 171. Memorandum for sale of partnership lands. The general features of the partnership relation, so far as it pertains to lands owned by the firm, has already been discussed,[63] but the subject requires a still further mention in this connection. The statute requires that the memorandum of sale shall be signed by the party to be charged and it is fundamental that where a contract is not so signed it is incapable of legal enforcement. To this rule equity has permitted some modification when the contract relates to lands owned by a firm. The general rule would seem to be, that, in consonance with

[59] Snyder v. Wolford, 33 Minn. 175.

[60] Gibbons v. Bell, 45 Tex. 417. An agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within the statute of frauds and need not be in writing. Murley v. Ennis, 2 Col. 300.

[61] Levy v. Brush, 8 Abb. Pr. (N. Y.) 418.

[62] Rawdon v. Dodge, 40 Mich. 697, and see Levy v. Brush, 45 N. Y. 589; Purcell v. Miner, 4 Wall. (U. S.) 513.

[63] See § 58 *ante*.

the partnership principle of mutual agency, each partner possesses full authority to contract for the sale or other disposition of the entire property of the firm, notwithstanding that the legal title is vested in all the partners. The rule acquires additional force where the partnership business consists only in dealing in real property, and the doctrine has frequently been announced that in such event a contract for a sale of the partnership lands, signed by one member of the firm only, does not contravene the terms of the statute and may be specifically enforced against all of the partners.[64]

§ 172. **Ante-nuptial agreements.** By the fourth section of the English statute of frauds, which has been re-enacted in some of the states, no action can be brought to charge any person upon any agreement made upon consideration of marriage, unless the same shall be in writing and signed by the person to be charged. Ante-nuptial agreements come within the provisions of this section. It has been held that a verbal ante-nuptial agreement might, under special circumstances, be enforced in equity to prevent the perpetration of a fraud; as, when the wife has by some artifice or trick prevented the contract from being reduced to writing, and has received a substantial benefit from it, so that it would operate as a fraud upon the husband. In such case there would appear to be no doubt of the power of a court of equity to afford the proper relief, notwithstanding the statute, on the general principle that the statute is never to be so expounded as to make it a mere instrument in consummating a fraud upon the party against whom it is invoked.[65]

As a general rule, however, a mere verbal agreement made before marriage, whereby the intended wife releases and renounces all interest in the proposed husband's estate, is obnoxious to the statute of frauds; nor will the signing of an ante-nuptial agreement in form, after marriage, although purporting to have been executed before that event, have the effect to take a verbal agreement of the same effect, made before marriage, out of the statute. The execution of such

[64] Rovelsky v. Brown, 92 Ala. 522; Thompson v. Bowman, 6 Wall. (U. S.) 316; Chester v. Dickerson, 54 N. Y. 1.

[65] McAnnulty v. McAnnulty, 120 Ill. 26; Jenkins v. Eldridge, 3 Story (C. Ct.), 181.

agreement can be regarded no further than as a mere acknowledgment in writing of the terms of the previous verbal agreement, which fails to meet the requirements of the statute.[66]

§ 173. **The description.** It is unnecessary to make more than passing allusion to the principles governing the description of the lands which form the subject-matter of a contract, as the essentials of same have already been quite fully discussed. It may be said, however, that parol evidence is inadmissible to supply a material omission in the writing of any reference to the particular property, yet a defect may frequently be aided by evidence showing the situation of the parties and the surrounding circumstances, and the identity of the particular property intended to be conveyed be thereby ascertained.[67] Thus, when the writing fails to specifically locate the lands, but refers to them in general terms, as where the agreement is for the sale of a house in which the vendor resides, parol evidence may be given to locate such house. Therefore, where upon a view of the writings it appears that both parties referred to the same property, it would seem the requirement of the statute is fulfilled, and parol evidence may be resorted to for the purpose of designating what particular land both parties had reference to.[68] In other words, if the writing itself discloses the essential fact that the minds of the parties met with respect to a certain property; that one agreed to sell and the other to purchase same, then parol evidence of existing facts and circumstances is admissible for the purpose of specific designation.

[66] McAnnulty v. McAnnulty, 120 Ill. 26.

[67] Preble v. Abrahams, 88 Cal. 245; Kennedy v. Gramling, 33 S. C. 367.

[68] Kennedy v. Gramling, 33 S. C. 367.

CHAPTER VI.

THE RELATION OF THE PARTIES.

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§ 174. Generally considered. There is a marked difference with respect to the relative rights and liabilities of the parties in the case of an ordinary executory contract at law and in equity. At law the contract receives only the interpretation expressed upon its face, and confers upon the parties mere rights of action; the estate remains the property of the vendor, and the unpaid purchase money that of the vendee.[1] But in equity the positions are reversed: the estate, from the making of the contract, is regarded as the property of the vendee, attended by most, if not all, of the incidents of ownership, while the purchase money is considered as belonging to the vendor.[2] This result is accomplished by the application of

[1] Lombard v. Sinai Congregation, 64 Ill. 477.

[2] Lombard v. Sinai Congregation, 64 Ill. 477; King v. Ruckman, 21 N. J. Eq. 599; Kerr v. Day, 14 Pa. St. 112; Dorsey v. Hall, 7 Neb. 464; Pease v. Kelly, 3 Oreg. 417; Baum v. Grigsby, 21 Cal. 175.

the familiar principle that equity looks upon things agreed to be done as actually performed; and hence a contract for the sale of land is, for most purposes, regarded in equity as if already specifically executed.[3] This doctrine, though but a legal fiction by which to work out certain ends or secure the attainment of a more complete administration of justice, has raised, as a corollary of its application, the further doctrine that the vendee is to be considered as trustee of the purchase money for the vendor, and the vendor in turn is regarded as the trustee of the land for the vendee;[4] and this trust binds and adheres to the land until it passes into the hands of a *bona fide* purchaser for a valuable consideration without notice.[5] The relation, therefore, is analogous to that of equitable mortgagor and mortgagee, the vendor holding the legal title as security for the unpaid purchase money, which security, it has been held, is essentially a mortgage interest. The vendee has an equity of redemption, and the vendor a correlative right of foreclosure upon default in the payments.[6] But in this, as in all similar cases, the mortgage is the incident, the debt the principal, and the vendor has no further interest except to the extent of the security the mortgage affords for his debt.[7] Subject to these rights of the vendor, the vendee has absolute control of the property, and may dispose of it or incumber it in exactly the same manner as land to which he has the legal title.[8]

[3] King v. Ruckman, 21 N. J. Eq. 599; Kerr v. Day, 14 Pa. St. 112.

[4] Craig v. Leslie, 3 Wheat. (U. S.) 578; Maddox v. Rowe, 23 Ga. 431; Lombard v. Sinai Congregation, 64 Ill. 477. It is upon the principle of the transmission, by the contract, of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of land mainly depends. Worrall v. Munn, 38 N. Y. 139; Brewer v. Herbert, 30 Md. 301.

[5] Wimbish v. Loan Ass'n, 69 Ala. 575; Baum v. Grigsby, 21 Cal. 175; Lewis v. Hawkins, 23 Wall. (U. S.) 125; Burch v. Carter, 44 Ala. 116.

[6] Church v. Smith, 39 Wis. 492; King v. Ruckman, 21 N. J. Eq. 599; Baldwin v. Pool, 74 Ill. 97; Fitzhugh v. Maxwell, 34 Mich. 138; Dew v. Dellinger, 75 N. C. 300; Reed v. Lukens, 44 Pa. 200; Cary v. Whitney, 48 Me. 516; Miller v. Corey, 15 Iowa, 166; Boon v. Chiles, 10 Pet. (U. S.) 177; Conner v. Banks, 18 Ala. 42.

[7] Strickland v. Kirk, 51 Miss. 795.

[8] Baldwin v. Pool, 74 Ill. 97; Smith v. Price, 42 Ill. 399; Ricker v. Moore, 77 Me. 295.

But while the vendee may sell and dispose of the land, subject to the rights of the vendor, and otherwise assert acts of absolute ownership and dominion, he has no authority to remove annexations of a permanent character, whether made prior or subsequent to the contract,[9] or to impair the security it affords by waste; for as long as any part of the purchase money remains unpaid, the land with its accretions of every character remains pledged for the satisfaction of the vendor's lien, and until the whole of the purchase money has been paid the vendor is not a mere naked trustee, but holds and retains an interest in the land.[10]

§ 175. Option of purchase. The remarks of the foregoing paragraphs have reference, however, only to bilateral contracts; for an agreement whereby the owner of land merely gives to a prospective vendee the right, option or refusal to purchase at any time in the future, confers upon the party having such option no interest, either legal or equitable, in the land. It is not a contract of sale within any definition of the term, and at best but gives to the option-holder a right to purchase upon the terms and conditions, if any, specified in the agreement or proposal. The right, to be made available, must be exercised at or within the time specified in the agreement,[11] or within a reasonable time if the option is not limited,[12] and the conditions precedent, if any are annexed, must be faithfully and punctually observed.[13] A partial performance of some of the stipulations which it is intended shall form a portion of the future contract of sale, while they may indicate an intention to make the purchase, does not confer any additional rights upon the prospective purchaser where the conditions upon which the option and right of purchase depends have not been complied with; and the non-compliance with such conditions is a sufficient ground for a denial of any claim of right in the land under the agreement.[14]

But where the owner of lands gives to another an option of purchase, and imposes certain conditions upon the party to

[9] Smith v. Moore, 26 Ill. 392; but see Raymond v. White, 7 Cow. (N. Y.) 319.

[10] Swepson v. Rouse, 65 N. C. 34.

[11] Martin v. Morgan, 87 Cal. 203; Harding v. Gibbs, 125 Ill. 85.

[12] Larmon v. Jordan, 56 Ill. 204.

[13] Bostwick v. Hess, 80 Ill. 138; Longfellow v. Moore, 102 Ill. 289; Sutherland v. Parkins, 75 Ill. 338; Gustin v. School Dist. 94 Mich. 502.

[14] Bostwick v. Hess, 80 Ill. 138.

whom the option is given, which have been by him duly observed and performed, a different relation is created.[15] The performance of the conditions amounts to an acceptance, and creates a mutuality and a consideration for the agreement to convey. The party to whom the offer was made having actually done, upon the promise of the owner, what he required to have done, it is then too late for the owner to recede; and it is immaterial, in such event, that the acts were performed without any previous undertaking on the part of the vendee.[16]

The legal effect of an option is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money or performance of prescribed conditions, within the time stated and before the offer is withdrawn. If not based upon a consideration the offer may be withdrawn at any time before acceptance;[17] if given for a consideration it is so far a contract as to vest an indefeasible right to exercise the privilege granted within the time limited.[18]

It will further be observed that a mere offer to sell, unless otherwise expressly provided, is personal in its nature and confined to the option-holder; and hence, if the one possessing such privilege fails to exercise it during the period limited for acceptance, or dies within such period without accepting, he has no estate in the land which can descend to his heirs, nor will they have any right to accept the proposal within the time allowed their ancestor.[19] Nor does an option create a transmissible right of property in the holder thereof while living or confer any substantial interest in the land which may be sold or conveyed to another.[20] There are a few cases which seem to militate against this position, but they do not represent the generally received doctrines in regard to same.[21]

§ 176. When equitable title vests. The oft-asserted proposition that, from the time of the contract for the sale of land,

[15] As where the vendee is to improve the tract, pay taxes, etc.

[16] Perkins v. Hadsell, 50 Ill. 216.

[17] Gordon v. Darnell, 5 Colo. 304; Bradford v. Foster, 87 Tenn. 8; Larmon v. Jordan, 56 Ill. 204.

[18] See § 125 *ante*.

[19] Sutherland v. Parkins, 75 Ill. 338; Newton v. Newton, 11 R. I. 390.

[20] Bras v. Sheffield, 49 Kan. 702.

[21] See Kerr v. Day, 14 Pa. St. 112; Peoples Ry. Co. v. Spencer, 156 Pa. St. 85.

the vendor as to the land becomes a trustee for the purchaser, and the latter as to the purchase-money becomes a trustee for the vendor, who has a lien upon the land therefor, while fully expressing the rule of equity in its general application, is nevertheless subject to some qualification under special circumstances, and is not of such potency as to establish an equitable title in the purchaser in opposition to expressed intent or clear legal implication. The essential feature of an equitable title is that it is one which appeals to equity for confirmation and enforcement. Hence, a mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. It is only when the purchaser performs or tenders performance of all the acts necessary to entitle him to a deed that he has an equitable title and may compel a conveyance. Prior thereto he has, at best, only a contract for the land when he shall have performed his part of the agreement.[22]

§ 177. Death of one of contracting parties. In framing agreements for the purchase of land it is an almost universal custom for the parties to contract as well for their heirs and personal representatives as for themselves; and even though this formality be omitted from the memorandum, the result will be the same; for the law presumes that the contingency of death was present in their minds, and that they intended to bind not only themselves, but those into whose hands the property might fall in the event of death prior to execution. Indeed, the executor or administrator, for all practical purposes, is the decedent himself and is liable in general to the extent of the assets which may come to his hands upon all contracts of the deceased remaining undischarged at his death.[23]

To the general proposition as last stated there is but one well-established exception, and this arises only when the performance of the contract is personal in its nature. Just what constitutes this exception the authorities do not inform us with any degree of certainty or particularity; but the illustra-

[22] Chappell v. McKnight, 108 Ill. 570.

[23] Phalman v. King, 49 Ill. 266; Brown v. Leavitt, 26 N. H. 493; Green v. Rugley, 23 Tex. 539; Billings' Appeal, 106 Pa. St. 558; Fowler v. Kelly, 3 W. Va. 71; Bell v. Hewitt, 24 Ind. 280; Hiatt v. Will-

tions ordinarily put of personal contracts on which no liability attaches to the legal representatives, unless a breach occurred in the life-time of the deceased, indicate those only which require individual skill or knowledge, or services which the contractor alone can perform.[24] So far as the obligation is to convey real estate, of course these would not apply; yet in cases of bilateral contracts they might play an important part, the inability of performance on one side excusing or preventing performance on the other.

The mere fact of personal service is not the controlling test, however, and if the contemplated services are of such a nature that they may be performed by others, the reason of the rule does not apply and the contract will survive;[25] yet the whole question in every case, from the difficulties which surround its solution, must necessarily depend upon attendant circumstances and the manifest intention of the parties.[26]

The vendor, being regarded simply as a trustee having an interest in the proceeds, but not in the land, this interest would pass upon his death to his personal representatives, and not to his heirs; and, while the heirs would take the legal title by descent, yet they would hold such title only as it was vested in the ancestor, which was only as a mere security for a debt. The debt, it is true, would be payable to the executor or administrator of the vendor; but as the land is considered to be held by the heirs in trust, and simply as a pledge or security for its payment, on the payment of the debt the heirs would be compelled in equity to execute the trust by a conveyance of the title, while the purchase money would go to the personal representatives.[27] The theory upon which this proceeds is, that a valid contract works an equitable conversion of land into personalty from the time it is made, and hence the purchase money becomes a part of the vendor's

iams, 72 Mo. 214; Stephens v. Reynolds, 6 N. Y. 458; Wright v. Tinsley, 30 Miss. 389.

[24] Janin v. Browne, 59 Cal. 44; Billings' Appeal, 106 Pa. St. 558.

[25] Hawkins v. Ball's Adm'r, 18 B. Mon. (Ky.) 816; Janin v. Browne, 59 Cal. 44.

[26] Billings' Appeal, 106 Pa. St. 558.

[27] Johnson v. Corbett, 11 Paige (N. Y.), 265; Moore v. Burrows, 34 Barb. (N. Y.) 173; Craig v. Leslie, 3 Wheat. (U. S.) 563; Miller v. Miller, 25 N. J. Eq. 354. A vendor may devise land contracted to be

estate, and is distributable upon his death among his legatees or next of kin.[28]

The equity which is vested in the vendee is a proper subject of devise by him, and will descend to his heirs the same as realty. The same rights which were possessed by their ancestor will devolve on them, and they may have an enforcement of the contract in their own favor. Hence, where there is a contract for the purchase of land, inasmuch as it descends in equity to the heirs of the vendee as real estate, they may call on the executors or administrators to discharge the contract out of the personal estate so as to enable them to demand a conveyance from the vendor.[29]

§ 178. **Subsequent insolvency of the parties.** If after the contract has been entered into either vendor or vendee should become bankrupt, the contract will not, for that reason, be discharged or otherwise materially affected. An adjudication in bankruptcy, as well as an assignment for creditors, has the effect of an absolute conveyance by which all the estate of the bankrupt is vested in the assignee; but the title in the hands of the assignee is relieved of none of its burdens.[30] It is no better than that held by the bankrupt, and if sold by such assignee the purchaser takes it charged with all the equities to which it was originally subject.[31] The theory is that an assignee does not take title as an innocent purchaser without notice, free from latent equities, etc., but as a mere volunteer standing in the shoes of the bankrupt, as respects the title, and having no greater rights in that regard than the bankrupt himself could assert.[32] As between the assignee and a vendee of the bankrupt the rights of such vendee will remain intact, notwithstanding he may have neglected to place upon record the evidence of his claim; as between him and a purchaser from the assignee his rights will still be preserved if he has taken the precaution to impart notice by any of the methods which the law directs, upon the principle that every subse-

sold to another person, but the devisee will take the title charged with a trust for the benefit of the contract vendee. McCarty v. Meyers, 5 Hun (N. Y.), 83.

[28] Miller v. Miller, 25 N. J. Eq. 365.

[29] Champion v. Brown, 6 Johns. Ch. (N. Y.) 398.

[30] Williams v. Winsor, 12 R. I. 9.

[31] Walker v. Miller, 11 Ala. 1076; Stow v. Yarwood, 20 Ill. 497; Hardin v. Osborne, 94 Ill. 571.

[32] Hardin v. Osborne, 94 Ill. 571.

quent purchaser from the vendor, with notice, becomes subject to the same equities as the party from whom he purchased; but if the land is conveyed to an innocent purchaser without notice, who places his deed upon record before that of the prior purchaser, such prior purchaser could not set up or show an unrecorded deed or agreement to defeat the title of the assignee's grantee.[33]

§ 179. **Payment of taxes.** The payment of taxes is a legal duty devolving upon each and every person legally or equitably interested in the land charged by the tax. Primarily the duty of paying the same rests upon the person who holds the legal title, and in the assessment and levy of the tax such person is usually designated by name. In this case the duty is a direct legal obligation, enforceable, if necessary, in an action of debt; and the obligation is equally binding upon a vendee who has stipulated or agreed to pay the same.[34] A vendee, prior to conveyance, who has not so agreed, will not be directly responsible for such tax; yet if his vendor should neglect to pay the same, and to protect his equity the vendee is obliged to discharge the tax, he will be considered only as having performed a duty incumbent upon him as a party in interest. He may have recourse over against his vendor under his covenants, but as respects the title he can gain no advantage. He cannot become a purchaser at any sale held for such taxes; and, should he become such, the payment of the money will be regarded only as a payment of the tax, and not as a purchase of the property.[35] As between the parties, all payments of taxes made by the vendee are presumed to be made on behalf of the vendor.[36]

As between vendor and vendee, prior to conveyance, the question as to who shall pay the current taxes does not seem to be of frequent occurrence in the courts. It is usually made a matter of a special stipulation in agreements for conveyance, and in cases where this has been omitted is regarded as a duty incumbent on the vendor, who must of necessity pay

[33] Holbrook v. Dickenson, 56 Ill. 497.

[34] Fitzgerald v. Spain, 30 Ark. 334.

[35] See Bailey v. Doolittle, 24 Ill. 577; Glancy v. Elliott, 14 Ill. 456; Ballame v. Forsythe, 13 How. (U. S.) 18; Fitzgerald v. Spain, 30 Ark. 334; Williams v. Townsend, 31 N. Y. 411.

[36] Lamborn v. Dickenson County, 97 U. S. 181.

the taxes levied or assessed at the time of his deed in order to keep good the covenants therein contained. It has been held, however, that in contracts for the sale of land, silent as to the payment of taxes, the party in the actual possession of the land should keep down the taxes,[37] and that where the land is vacant a vendee, who by full performance on his part is entitled to possession by implication of law, should thereafter pay the taxes.[38]

In agreements for exchange it is usual to make specific mention of the taxes and to provide for their payment; but unless it clearly appears as to what lands each of the parties is to assume the taxes, or where the matter is referred to only in general terms, it will be considered that the stipulation applies to the property each party is selling and not to that which each is receiving.[39]

§ 180. **Interest—Rents and profits.** Where a speedy consummation of the sale is contemplated it is not customary, as contracts are now drawn, to stipulate for interest on the one hand or with respect to rents and profits on the other. The vendor usually remains in the possession of the property, while the vendee, with the exception of whatever may have been paid by the way of earnest, retains the purchase money. Yet, as equity regards as actually performed that which is agreed to be done, it would seem that a purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract; and as the money from that time belongs to the vendor, the purchaser should be compelled to pay interest for it.[40] Certainly this should be the case where unavoidable long delays intervene, or where delay is attributable to the fault or neglect of either party, the other party being in no way blamable.

As a general rule interest on the purchase money should commence when, by the terms of the contract, such money is

[37] Farber v. Purdy, 69 Mo. 601.

[38] Sherman v. Savery, 2 Fed. Rep. 505. Further held in this case that it is no defense against such obligation that the vendor refused to convey to him, but conveyed to another against whom a decree for specific performance was afterwards entered.

[39] Morrison v. Wasson, 79 Ind. 477.

[40] See Parke v. Leewright, 20 Mo. 85; Hundley v. Lyons, 5 Munf. (Va.) 342; Cleveland v. Burrell, 25

due;[41] and if the delay in completing the contract is attributable to the purchaser, he will be compelled to pay interest from the time the contract ought to have been carried into effect, although the money may have been lying ready and without interest being made upon it. But if the delay has been occasioned by default of the vendor, and the money has been kept ready and unproductive in the hands of the purchaser, he will not be obliged to pay interest.[42] It seems, however, that the purchaser should, in general, give notice to the vendor that the money is ready and producing nothing;[43] for otherwise it is said there is no equity, as the one knows the estate is producing profit, while the other does not know that the money does not produce interest;[44] yet, even though such notice be given, if the money is not actually and in good faith appropriated for the purchase—if the vendee uses it in any manner so as to gain some advantage from it—he may still be compelled to pay interest.[45]

If no time be limited for the performance of the agreement, and if the purchaser is let into possession thereunder he should pay interest on the unpaid purchase money from that time,[46] as in contemplation of law he is in the enjoyment of the rents and profits of the land. In cases of vacant property, wild, uncultivated or unproductive land, it has been held that a contract to pay interest will not be implied where the purchaser is prevented from obtaining title by the fault or negligence of the vendor, notwithstanding such purchaser has been in possession;[47] but ordinarily the rule first stated will apply, and it must be a strong case, clearly made out, in which the purchaser will not be obliged to pay interest where he has received the rents and profits.[48]

With respect to interest payable by the vendor the cases

Barb. (N. Y.) 532; Hepburn v. Dunlap, 1 Wheat. (U. S.) 179.

[41] Baxter v. Brand, 6 Dana (Ky.), 298.

[42] Hunt v. Brand, 1 A. K. Marsh. (Ky.) 161; McKay v. Melvin, 1 Ired. (N. C.) 73.

[43] Brockenbrough v. Blythe, 3 Leigh (Va.), 619.

[44] Selden v. James, 6 Rand. (Va.) 465; Hunter v. Bales, 24 Ind. 299.

[45] Davis v. Parker, 14 Allen (Mass.), 104.

[46] Stevenson v. Maxwell, 2 Comst. (N. Y.) 408; Ramsay v. Brailsford, 2 Des. (S. C.) 592; Hundley v. Lyons, 5 Munf. (Va.) 342.

[47] Stevenson v. Maxwell, 2 Sandf. Ch. (N. Y.) 273.

[48] Selden v. James, 6 Rand. (Va.) 465; Cullum v. Bank, 4 Ala. 22; Boyce v. Britchett, 6 Dana (Ky.)

are rare where this will prevail. The deposit, by the terms of the agreement, is usually forfeited to the vendor in case of noncompliance on the part of the vendee, and where, through failure of title or other inability by the vendor to consummate the sale according to the terms of the contract, the deposit is usually returned without allowance for its use. It has been held, however, that where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express agreement.[49]

It would seem to be the rule in England that if a vendor cannot make a marketable title, and the purchaser's money has been lying ready without interest being made by it, the vendor must pay interest to the purchaser;[50] and this has been recognized to some extent in this country.[51]

The right to rents and profits accrues when the purchaser is entitled to possession,[52] and a vendor retaining the possession should account to the purchaser for the rents and profits from the time possession was to have been surrendered.[53] If in the contract no day is specified for delivering the deed and the surrender of possession, but the money is to be paid on delivery of the deed, it must be understood that the deed is to be delivered and possession given without delay. If, therefore, this be not done, the vendor is bound to account for and pay over the profits of the land received by him after the contract was made—the vendee, of course, to pay interest on the money from the time it would have been payable if the deed had been immediately delivered.[54]

231. A vendee, who enjoys the estate and withholds the purchase money until a dispute in the title is adjusted, ought to pay interest. Breckenridge v. Hoke, 4 Bibb. (Ky.), 273.

[49] See Teaffe v. Simmons, 11 Allen (Mass.), 342.

[50] 2 Sugd. Vend. 330.

[51] See Williams v. Rogers, 2 Dana (Ky.), 375. Where the vendor is indebted to the vendee and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated until he makes a title; and the vendee is accountable for the rents and profits from the time the title is perfected until the contract is specifically performed. Hepburn v. Dunlap, 1 Wheat. (U. S.) 179.

[52] Baxter v. Brand, 6 Dana (Ky.), 298.

[53] Mason v. Chambers, 3 T. B. Mon. (Ky.) 323.

[54] Hundley v. Lyons, 5 Munf. (Va.) 342.

When a contract for the sale of land, which the purchaser has paid for and was put in possession of, is rescinded for causes free of fraud, the use of the money and the use of the land are held to balance each other. The decree should in general restore the money to the purchaser without interest, and the land to the vendor without rents or profits. But if the purchaser has made valuable and lasting improvements on the land, or if it has suffered in his hands through neglect or mismanagement, then these things are the subject of valuation, account and final settlement by the decree.[55]

§ 181. **The risk of loss.** As the property is regarded as belonging to the vendee from the time of the delivery and acceptance of the written contract, it follows that any loss arising from deterioration between the agreement and conveyance falls upon and must be borne by him.[56] Hence, if any of the buildings or improvements are destroyed by fire during this period the vendee must bear the loss,[57] unless there is an agreement to deliver possession with improvements in the same condition as at the time of sale,[58] or unless the loss occurs by the culpable negligence of the vendor.[59] It is the duty of the vendee to protect himself against loss, and failing in this he must bear the same if any is entailed.

This rule, in its application, presupposes an ability and a willingness to convey on the part of the vendor; for the purchaser in a case of this kind can only be said to be owner from the date of the contract, when the vendor is prepared to convey a clear title and is not in default. If the vendor is so situated that he cannot make title according to the contract, the purchaser will not be regarded as the owner; and if the property is damaged before the vendor is in condition to convey, the loss must fall on him and not on the purchaser.[60]

§ 182. **Duty of repairing buildings.** It would seem that a party agreeing to sell and convey premises at a future day

[55] Williams v. Rogers, 2 Dana (Ky.), 375.

[56] Reed v. Lukens, 44 Pa. St. 200.

[57] Snyder v. Murdock, 51 Mo. 175; Bautz v. Kuhworth, 1 Mon. J. 133; Brewer v. Herbert, 30 Md. 301.

[58] Goddard v. Bebout, 40 Ind. 115.

[59] Marks v. Tichenor, 4 S. W. Rep. (Ky.) 225. But see, *contra*, Wells v. Calnan, 107 Mass. 514.

[60] Christian v. Cabell, 22 Gratt. (Va.) 82; and see Huguenin v. Courtenay, 21 S. C. 403.

does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair or to guard against the decay which is due to time and ordinary use.[61]

§ 183. **Right of possession.** It is a rule of law that the legal title of land draws to it the right of possession, and wherever this title rests there also lies the right of possession and occupancy. Hence, the mere purchase of land does not authorize the purchaser to enter into possession without license from the seller.[62] Such license may be express or implied from the circumstances;[63] but a simple agreement to convey title at some future day does not in itself confer it, and if unaided by other facts is no evidence of possessory rights.[64] The purchaser may enter under such license, but his possession is after all only the possession of the vendor. By the purchase he recognizes the vendor's title, and, like a tenant, in all proceedings for the recovery of the possession by the vendor, is estopped from disputing his title. He enters and holds under the title of the vendor, and his occupancy is subservient and subordinate to that title; and from this relation and for the same reason his possession becomes as fully that of the vendor as does that of a tenant become that of the landlord.[65] Still, as the vendor, though in law the owner of the legal title, holds it in equity simply as the trustee of his vendee, it has been held that he cannot turn his beneficiary out of possession so long as the latter offers to perform the contract.[66]

It has been held that, notwithstanding the rule whereby possession follows the legal title as an incident, if the land is vacant, and the vendee has paid the entire consideration and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land.[67] An implied right

[61] Hellreigel v. Manning, 97 N. Y. 56.

[62] Chappell v. McKnight, 108 Ill. 570; Williams v. Forbes, 47 Ill. 148; Druse v. Wheeler, 22 Mich. 439.

[63] Chappell v. McKnight, 108 Ill. 570.

[64] Chappell v. McKnight, 108 Ill. 570; Suffern v. Townsend, 9 Johns. (N. Y.) 35; Erwin v. Clinstead, 7 Cow. (N. Y.) 229; Druse v. Wheeler, 22 Mich. 439.

[65] Hale v. Gladfelder, 52 Ill. 91.

[66] Whittier v. Stege, 61 Cal. 238.

[67] Miller v. Ball, 64 N. Y. 293;

of possession may also result from a fair construction of the contract. Thus, a contract which reserves to the vendor the right of re-entry in case the purchaser makes default in his payments, and a right of distress upon the premises for arrears of interest, or provides that on default the purchaser may be regarded as a tenant holding over without permission, and for the recovery of damages for waste, gives the vendee the right of possession by necessary implication, where it fails to do so in express terms.[68]

A more radical view has been taken of the vendee's possessory rights in some of the states, and the reservation of interest on the purchase money has been offset by allowing the purchaser to use the premises.[69]

§ 184. **Delivery of possession.** No formality of any kind is now required to place a purchaser in possession. The delivery of a key by the vendor at the conclusion of a treaty for the sale of property is a symbol indicative of the delivery of the possession of the house or lands purchased to which the key belongs.[70] This is a usual formality in sales of improved property, but is wholly unnecessary as the delivery of the deed carries with it the right of possession, and such delivery is itself an all sufficient symbol.

§ 185. **Rights of vendee in possession.** Where the purchaser has been let into possession he is, in equity, the owner, subject only to the lien of the vendor for the unpaid purchase money. He has a right to the free use and enjoyment of the property, and to the rents, issues and profits thereof, so long as he is not in default under the contract. He may mortgage it for the payment of his debts;[71] may sell and assign his rights to another; or may create a privilege or easement upon any part of the premises which will be valid and binding, but liable to be defeated should there be a failure to pay the balance of the purchase money according to the terms and conditions of the contract of purchase.[72] The vendor, in such

Sherman v. Savery, 2 Fed. Rep. 505.

[68] Martin v. Scofield, 41 Wis. 167.

[69] Drake v. Barton, 18 Minn. 462.

[70] Canal Co. v. State, 53 Ind. 575.

[71] Baker v. Bishop Hill Colony, 45 Ill. 264.

[72] As where the vendee, upon receiving a bond for a deed, was let into possession, and while so in possession, and in no respect in default under the contract, conveyed to a third person the privilege or right to build a

a case, cannot interfere with the free use and enjoyment of the premises by the vendee, or with any one having a privilege from such vendee, provided that there is no lessening of the security for the purchase money occasioned thereby;[73] nor will he be permitted to invade the possession of the vendee or his assigns, and remove any of the natural or artificial objects upon the land.[74]

§ 186. **Vendee's assertion of hostile title.** It may be stated as a general rule, that, while the contracting parties are in most respects supposed to stand upon a footing of equality, by which each is entitled to the benefit of his own judgment and the fruits of his own prudence and sagacity, yet with regard to the property the relation is strictly confidential, and imposes upon either party the due observance of corresponding duties. In furtherance of this principle we find authorities announcing the doctrine that a vendee will not be permitted to buy an outstanding incumbrance or other hostile claim, and set up an adverse title under them against his vendor,[75] and that in case he should attempt so to do such acquisition will be considered as having been made for no other purpose than the protection of the vendor's title.[76] Indeed, under these decisions, both vendor and vendee are

dam across a creek in one corner of the land to draw off the water in a millrace to his mill. *Held*, on a bill to enjoin him from digging said race-way and dam, that the contract which he had obtained from the vendee was a sufficient justification as against the acts charged in the bill, but that its future validity would depend upon whether there should be a faithful compliance with the terms and conditions of the contract of sale on the part of the purchaser. Baldwin v. Pool, 74 Ill. 97. And see, in support of the general propositions of the text, Baker v. Bishop Hill Colony, 45 Ill. 264; Whittington v. Simmons, 32 Ark. 377.

[73] Baldwin v. Pool, 74 Ill. 97.

[74] Smith v. Price, 42 Ill. 399. This was a case where land had been sold under a contract and the purchaser let into possession, and the vendor went upon the premises and removed young trees and ornamental shrubs. In an action of trespass by the purchaser the court said: "The defendant had no right of entry, and his entry was a trespass; and he is liable for all injuries done to the premises, which was in fact the property of the plaintiff, subject to the lien of the defendant for the unpaid purchase money." See, also, Stow v. Russell, 36 Ill. 23.

[75] Cromwell v. Craft, 47 Miss. 44; Wade v. Thompson, 52 Miss. 367.

[76] Kirkpatrick v. Miller, 50 Miss. 521; Wilkinson v. Green, 34 Mich. 221.

estopped from buying in a title adverse to the other unless it be for the purpose of mutual protection.[77] Probably these decisions most truly express the spirit of the law; for it is fundamental that no one who goes into possession of land under another, or acknowledging the title of another, will be heard to dispute the title of that other during the continuance of the relation. This doctrine has been extended and held to apply fully to the case of one who goes into possession of land under a contract of sale.[78] Whatever may be his precise relation to the property and to the owner—for upon this point the authorities are not altogether agreed—whether a tenant or a licensee, it is generally conceded that his holding is not adverse, and cannot become so until by some unequivocal act he has repudiated the relation.[79]

On the other hand we find apparently well-considered cases which announce that the vendee is under no obligation to maintain his vendor's title, and that there is no policy of law that forbids the vendee in possession to buy in an outstanding title to the premises and assert it against his vendor; otherwise it is said, it might be asserted by the owner, or a stranger might buy it, and it would be lost to both.[80] In most of the cases which sustain this doctrine there are peculiar circumstances which have shaped the policy of the court, but the doctrine itself is usually announced in unqualified terms. In one of the earliest and probably most authoritative of these

[77] Aston v. Robinson, 49 Miss. 353; Austin v. McKinney, 5 Lea (Tenn.), 488; Wilkinson v. Green, 34 Mich. 221.

[78] Greene v. Munson, 9 Vt. 37; Ripley v. Yale, 18 Vt. 220; Ormond v. Martin, 37 Ala. 598; Stamper v. Griffin, 20 Ga. 312; Harris v. King, 16 Ark. 122; Burnett v. Caldwell, 9 Wall. (U. S.) 290; Austin v. McKinney, 5 Lea (Tenn.), 488; Wilkinson v. Green, 34 Mich. 221.

[79] Harral v. Leverty, 50 Conn. 46; Burnett v. Caldwell, 9 Wall. (U. S.) 290; Harris v. King, 16 Ark. 122; Kerns v. Dean, 77 Cal. 555.

[80] Green v. Dietrich, 114 Ill. 636. In this case the purchaser entered into possession under an agreement that the purchase money was not to be paid unless the vendor should, within three years, make him a warranty deed conveying a perfect title; and in case of failure to make him such conveyance, the purchaser was to remain in possession of the premises for the period of three years, and pay a reasonable rent for the same for the time he could hold peaceable possession, and before the expiration of the three years he acquired the title from other parties. *Held*, that there was nothing in the relation of the parties, under the

cases[81] the propriety of applying the doctrines which exist between lessor and lessee to vendor and vendee is doubted and denied. The title of the lessee, it is argued, is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. Having, therefore, no independent right in himself, and it being a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration, he is not permitted to controvert the title of his lessor without disparaging his own, and cannot set up title in another without violating that contract by which he obtained and holds possession. These principles, it is contended, do not apply to the relation of vendor and vendee. The vendee acquires the property for himself, and his faith is not pledged, like that of a lessee, to maintain the title of his vendor, and that the property becoming by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises.[82] Probably no very serious objection can be made to these principles in the case of an executed contract. If the vendor has made a conveyance his title is extinguished in law as well as in equity, and the only controversy which should arise between him and his vendee relates to the payment of the purchase money. But it is difficult to perceive wherein the possession of a licensee differs from that of a lessee so far as respects his duty to his licensor.

A party in possession of land under a contract of purchase is estopped from denying the title of his vendor upon the principle that he shall not use the possession acquired from an apparent owner to the injury of such owner. But the rule, it is to be observed, does not apply when the right of possession is not involved. Thus, while a tenant cannot deny the landlord's title in an action to recover possession, or for rent, when

original contract or otherwise, that prevented the purchaser from yielding to the superior title and purchasing the same, and in that way secure his peace.

[81] Blight's Lessee v. Rochester, 7 Wheat. (U. S.) 535. This case seems to make a distinction between a vendee in possession and one not in possession.

[82] See, also, Jackson v. Johnson, 5 Cow. (N. Y.) 74.

the lessee has actually enjoyed the premises, yet he may do so when he has not been in the actual occupation;[83] and so, in an action to recover the amount agreed to be paid on a contract of purchase, the vendee may defend on the ground that the seller has no title and can give none.[84]

An important distinction also seems to be made where the original entry is independent of the vendor, and in these cases, while the general rule that a vendee who enters into possession under a contract of purchase cannot, while so in possession, dispute the vendor's title, is recognized, yet it is held not to apply where, at the time of the contract, the vendee is already in possession as owner claiming title. In such event, it is contended that the case lacks the essential element which creates estoppel, and that, as the vendee does not acquire possession by virtue of any consent or contractual relation with his vendor he is at liberty to purchase the land over again as often as claimants, who are not in possession, may appear, and thus quiet and fortify his title without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so.[85]

§ 187. **Vendee's possession not adverse.** Leaving out of view the main question discussed in the last paragraph, it would seem certain that a vendee under a bond or contract for conveyance, though placed in possession by the vendor, does not hold adversely to the latter. Whether the contract stipulates for possession by the vendee, or the vendor of his own motion puts him in possession, his real holding is that of licensee. The relation of landlord and tenant does not exist between them; for the characteristic feature of that relation is wanting, the vendee paying nothing for his enjoyment of the property. Such a case comes within the category of a license, and in such cases the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor.[86] By the very fact of taking under a bond or contract

[83] Vernam v. Smith, 15 N. Y. 328.

[84] Burwell v. Jackson, 9 N. Y. 535; Stanley v. Stanley, 18 N. Y. 508.

[85] Greene v. Couse, 127 N. Y. 386; Bain v. Matteson, 54 N. Y. 666.

[86] Burnett v. Caldwell, 9 Wall. (U. S.) 290; Harris v. King, 16 Ark. 122; Whiteside v. Jackson, 1 Wend. (N. Y.) 422; Hart v. Bostwick, 14 Fla. 162; Browning v. Estes, 3 Tex. 462; Stamper v. Griffin, 20 Ga. 312; Long v. Stock Yards Co. 107 Mo. 298.

for a deed to be thereafter executed by the vendor, a purchaser recognizes the title of his vendor, and acknowledges himself as holding in subordination and not in antagonism to it. No length of time short of the period prescribed for the limitation of an entry into lands, or at least for the foreclosure of a mortgage, should be permitted to work an adverse holding; for if it appears that the purchaser entered into possession under an agreement for conveyance and in amity with the holder of the fee, the law will presume a continuance of that relation until the contrary appears.[87] It is true this relation may be subsequently changed, and the purchaser may assume an adverse position; but when this is claimed it must be abundantly proved—possession alone is insufficient.[88]

The full payment of the purchase price, however, removes the reason for the rule; and hence, where the consideration is paid and the owner consents that the purchaser may enter and hold the land as his own, such entry and possession cannot be deemed subordinate to the title of the vendor, but is adverse, and a practical disseizin.[89] And it is immaterial, in a case of this kind, whether the contract be in writing or by parol, for the vendee, having discharged all pecuniary duty to the vendor, becomes clothed with an equity which renders his possession antagonistic both to the vendor and to strangers. If such possession is continued for the statutory period it will form a complete bar to the vendor's right of entry or action;[90] unless overcome by positive evidence showing a recognition of the vendor's rights or a subordination to his legal estate.[91] Nor will such possession cease to be adverse simply because of the vendee's knowledge of defects in his title, nor by reason of his subsequent demands for a deed.[92] If he asserts a purpose to rely upon his possession and claim of right, it is not essential that he should believe it to be good.[93]

[87] Butler v. Douglass, 3 Fed. Rep. 612; and see Whiteside v. Jackson, 1 Wend. (N. Y.) 422; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Adair v. Adair, 78 Mo. 634; Chapman v. Chapman, 91 Va. 397.

[88] Kerns v. Dean, 77 Cal. 555.

[89] Hart v. Bostwick, 14 Fla. 162; Drew v. Towle, 30 N. H. 531; Dean v. Brown, 23 Md. 11.

[90] Newsome v. Snow, 91 Ala. 641.

[91] Potts v. Colman, 67 Ala. 221.

[92] Newsome v. Snow, 91 Ala. 641.

[93] The expression "good faith," must not be understood to involve an inquiry as to the party's belief in the strength of his title, or to mean that to constitute his possession adverse he must claim in good

There would seem to be some dissent from this doctrine in some of the states, where it is held that notwithstanding that by payment of the entire purchase money the vendee has acquired the full equitable title, he yet cannot be said to hold adversely to his vendor.[94] In such case the vendee is still regarded as holding in subordination to and under the protection of the vendor's legal title. Such possession, it is said, is in privity with and subservient to the legal title, which the vendee will not be permitted to impeach or assail, and no length of time will be sufficient for such possession to ripen into an adverse title. The question becomes important only where the vendor has made some disposition of the lands subsequent to the entry by the vendee. In such event, under the view we are now considering, it would seem that unless the vendee has in some way dissevered the privity between himself and the vendor, by the assertion of an adverse right, and unless such assertion has been brought to the knowledge of the vendor or his grantee, no claim of adverse possession will be allowed.[95] These views are of doubtful utility, however, for the rights of the occupant of land, where the possession is open and notorious, must still be respected and such possession is notice to the world of the right or claims of the vendee.[96]

The doctrine has been announced in strong terms by the federal courts that while the vendor before deed is a trustee of the vendee for the conveyance of the title, and the vendee in turn a trustee for the payment of the purchase money, yet that the vendee is in no case a trustee of the vendor as to the possession of the property sold; that the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor save the terms which the contract imposes; and that his possession is, therefore, adverse as to the property, but friendly as to the performance of the conditions of

faith to have the paramount right, before the bar of the statute is complete. Good faith in claiming possession—the real intention to hold the land as his own, distinct from and hostile to the title and possession of the true owner—is the test of adverse possession in this respect. Dothard v. Denson, 72 Ala. 541.

[94] See Clarke v. McClure, 10 Gratt. (Va.) 305.

[95] Chapman v. Chapman, 91 Va. 397.

[96] Pleasants v. Blodgett, 39 Neb. 741.

purchase.[97] This result, it is claimed, follows as a legal sequence from the fact that the vendee is the equitable owner; and having taken possession under the contract, the vendor is in the situation only of an equitable mortgagor. Also, that where an entry is by purchase and the purchaser claims the land in fee, he is not a trustee; his title, though derivative from and consistent with the original title of the vendor, is nevertheless a present claim in exclusion of and adverse to it. There is nothing objectionable about this doctrine unless it is perverted; for, whether the possession of the vendee be regarded as subservient or adverse, the rule is the same that equity will not permit a vendor to assert a legal right of possession unless the vendee has violated the contract, and will be enjoined from so asserting title if the vendee performs it.

It will thus be seen that the subject is involved in much doubt and depends for its construction on local policy whenever presented. There is another phase of same, however, in respect to which the authorities are mainly agreed, and that is, that, as to all persons, except the vendor, the possession of one holding under an executory contract may be deemed adverse.[98]

§ 188. **Vendee may attorn to stranger.** It has been held that while, as a general rule, it is true that one who goes into possession of land under a contract of purchase cannot at law dispute the title of his vendor, so long at least as his possession is not disturbed, yet if the vendor himself parts with the title, or if the land is sold under execution against him, the vendee may in good faith attorn to the purchaser; and in an action of ejectment by the vendor against the vendee, the vendee may, even though the purchase money is still unpaid, show such sale and attornment as a defense to the action.[1]

§ 189. **Judgments against vendor.** A judgment regularly docketed creates a lien upon the legal title of all lands standing in the name of the judgment debtor; and notwithstanding he may have contracted to sell the land prior to the rendition

[97] Boon v. Chiles, 10 Pet. (U. S.) 177; Bright's Lessee v. Rochester, 4 Pet. (U. S.) 506.

[98] Ketchum v. Spurlock, 34 W. Va. 597.

[1] Beall v. Davenport, 48 Ga. 165.

of the judgment, it will, in contemplation of law, still be a charge upon such land and bind the legal title. But equity limits and restricts this lien to the amount of the unpaid purchase money as against a party holding under a contract of purchase;[2] and on a sale under the judgment the sheriff's vendee would stand in precisely the same position as the original vendor, entitled only to the unpaid purchase money.[3]

Land in the possession of a vendee under a valid contract of sale cannot be taken in execution and sold as the property of the vendor under judgment liens obtained after the contract of sale was made,[4] and sales under execution issued on such judgments will be enjoined at the suit of the purchaser.[5] The possession of the vendee is notice of his rights, and all persons are bound, at their peril, to recognize and respect them;[6] and if the vendee, with no actual knowledge of the judgment, continues to make payments to the vendor he will be entitled to the full benefit of same.[7]

§ 190. **Judgments against vendee.** The interest of a vendee under a contract of purchase is only an equity, and the rule is that a judgment at law is not a lien upon a mere equitable interest in land. Before the purchase money has been fully paid such interest is not subject to the lien of a judgment, nor does the vendee possess any such legal estate in the land as can in any way be reached by process of law.[8] But where the vendee has actually paid all the purchase money, so that the vendor holds the property as a mere naked trustee for the use of the vendee, this fact, together with possession, particularly if extended over a period of years, will, it seems, vest such a title in him as may be sold on execution, even though he does not possess seizin at law.[9]

[2] Moyer v. Hinman, 17 Barb. (N. Y.) 139; Parks v. Jackson, 11 Wend. (N. Y.) 442; Filley v. Duncan, 1 Neb. 334; Stewart v. Coder, 11 Pa. St. 90.

[3] Kinports v. Boynton, 120 Pa. St. 306.

[4] Adicks v. Lowry, 12 Rep. 764; When v. Fall, 55 Neb. 547.

[5] Jackson v. Snell, 34 Ind. 241.

[6] Moyer v. Hinman, 13 N. Y. 180; When v. Fall, 55 Neb. 547; but see Lefferson v. Dallas, 10 Ohio St. 68.

[7] Moyer v. Hinman, 13 N. Y. 180; When v. Fall, 55 Neb. 547.

[8] Trimm v. Marsh, 54 N. Y. 612; Jackson v. Parker, 9 Cow. (N. Y.) 83; Kellogg v. Wood, 4 Paige (N. Y.), 619.

[9] Talbot v. Chamberlin, 3 Paige (N. Y.), 220; Purdy v. Doyle, 1 Paige (N. Y.), 558. Where the owner of land has entered into a bond to convey it on being paid

§ 191. **Vendor's possession after sale.** A vendor who remains in possession after the contract and before conveyance, while in law the owner and as such entitled to all the rights that follow or attach to legal ownership, is nevertheless in equity but a trustee for the purchaser. He may not treat the estate as his own, and if he wilfully damages or injures it he will be liable to the purchaser.[10] Indeed, some of the authorities say that he is liable if he does not take reasonable care;[11] but this doctrine, which is of English origin, does not seem to have received any general recognition in this country, while late authorities have pronounced a contrary rule.[12] The vendor would have no right to remove trees, shrubs or other natural increment of the land; and should he do so the vendee might, it seems, have recourse against him as for trespass. This would certainly be the case if the vendee had been let into possession; and in principle there should be no difference in the application of the rule.[13]

§ 192. **Vendor's possession after conveyance.** A grantor remaining in possession of the property, after a conveyance with general warranty, would seem to be effectually estopped by the covenants of his deed from claiming any rights or interests in the land inimical to his grantee; and such has been held to be the rule.[14] A grantor who conveys by quit-claim only, by remaining in possession of the property and asserting a hostile claim, has been permitted to acquire an adverse title against his grantee by virtue of the statute of limitations;[15] while some courts have even held that a grantor with warranty may, subsequent to the delivery of his grant, originate an adverse possession, and is not estopped from asserting the same by his covenant of warranty.[16]

the whole amount of the agreed purchase money, and a part of it has been paid by the obligee, who enters into possession, it seems that his creditors may avail themselves of chancery jurisdiction to obtain a conveyance of the property to themselves, or a sale of it for their benefit, upon offering to complete the payment of the agreed purchase money. Ayer v. Bartlett, 6 Pick. (Mass.) 71, 76.

[10] Smith v. Price, 42 Ill. 399.

[11] See Lysaght v. Edwards, 2 Ch. D. (Eng.) 499.

[12] See Hellreigel v. Manning, 97 N. Y. 56.

[13] See Smith v. Price, 42 Ill. 399; Stow v. Russell, 36 Ill. 23.

[14] Van Keuren v. R. R. Co. 38 N. J. L. 165; McCormick v. Herndon, 67 Wis. 650.

[15] Dorland v. Magilton, 47 Cal. 485.

[16] Sherman v. Kane, 86 N. Y. 57.

But to enable a grantor with warranty to hold adversely to his grantee, such holding must be established by clear and undoubted testimony showing a change in the relations of the parties toward the land. The mere fact of the retention of possession is in itself insufficient; for the presumption of law in such case is that he remains in possession by permission, and that his holding is in amity with and in subservience to the title he has given.[17] Indeed, a grantor will ordinarily be estopped by his own deed from claiming that his possession is adverse to his own grantee.[18]

Where after delivery of deed the grantor remains in possession, or on demand refuses to surrender the same to his grantee, he assumes the attitude of a trespasser and may be dispossessed by action. He may also be treated as a tenant at will and liable to his grantee for rent; and though he afterwards abandons the premises which the grantee proceeds to occupy, the grantee may recover for the use of the land during his exclusion, and parol evidence will not be admitted to show a reservation of possessory rights in the grantor.[19]

§ 193. **Destruction of property—Proceeds of insurance.** Among the common questions growing out of the relation of vendor and vendee is that which arises where, subsequent to the execution and prior to the consummation of the contract of sale, the improvements upon the land are destroyed by fire or other casualty. By the well-known rules of equity the property is regarded as belonging to the vendee, the vendor retaining the legal title simply as his trustee and as a security for the unpaid purchase money. Ordinarily, if the property has been insured by the vendor, the loss, under the strict rules of law, would be payable to him, as he is still regarded as the owner of the property. Yet as between himself and the vendee the property is not his, but that of the vendee; and the question which under these facts arises is: Can he appropriate to himself the money which the insurance company has become liable to pay on account of the loss? If it is conceded, as it must be, that the vendor held the property only in trust,

[17] Jones v. Miller, 3 Fed. Rep. 384; Horbach v. Miller, 4 Neb. 31; Schwallback v. R. R. Co., 69 Wis. 292; and see Abbott v. Gregory, 39 Mich. 68.

[18] McCormick v. Herndon, 67 Wis. 650.

[19] Jones v. Timmons, 21 Ohio St. 596.

then it would naturally follow that the right which accrued in consequence of its destruction took its place, was held in the same way, and was liable to be enforced in a court of equity. This would seem to be the plain result of the principles governing the relations between the parties established by an ordinary contract of sale.[20]

So far as insurable interests are concerned, both parties possess them.[21] Either party may therefore effect insurance, but to whom the money shall be paid in case of loss seems to be a question that has been the subject of much dispute and considerable diversity of opinion. A learned writer says: "Where the vendor, in a contract for the sale of a house which is destroyed by fire before the completion of the purchase, receives payment for the loss under a policy which existed at the date of the contract, no reference being made in the contract to the insurance, the vendee has no claim upon the funds."[22] And this doctrine seems to have received the general assent of the English courts. There is manifest injustice in this, for it practically gives the vendor his purchase money twice over—in the first instance from the purchaser, and again from the insurance company; and equity, while it enforces payment by the purchaser, who may get practically nothing, will not relieve him from the legal consequences of the contract and of subsequent events.[23]

A more reasonable and just rule seems to have been adopted by the courts of the United States, and in many of the states it is the settled doctrine that money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will in equity inure to the benefit of the vendee[24]—the vendor still retaining his character of trustee, while the insurance money in his hands represents the property that has been destroyed.[25]

[20] Reed v. Lukens, 44 Pa. St. 200; Ins. Co. v. Updegraff, 21 Pa. St. 513.

[21] Hough v. Ins. Co., 29 Conn. 10; Perry Co. Ins. Co. v. Stewart, 19 Pa. St. 45; Imperial Ins. Co. v. Dunham, 117 Pa. St. 460; Brewer v. Herbert, 30 Md. 301; Franklin Ins. Co. v. Martin, 41 N. J. L. 568; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385.

[22] May on Ins. (2d ed.) § 450.

[23] But see Wells v. Calnan, 107 Mass. 514.

[24] Reed v. Lukens, 44 Pa. St. 200; Hill v. Cumberland, etc., Co., 59 Pa. St. 474.

[25] Ins. Co. v. Updegraff, 21 Pa. St 513.

If the vendee has procured insurance for his own benefit, and without any agreement to insure for the benefit of the vendor, it seems the latter can claim no benefit from the insurance.[26] In support of this it is contended that a contract of insurance against fire, as general rule, is a mere personal contract between the assured and the underwriter to indemnify the former against the loss he may sustain, and as an illustration is cited the familiar case of mortgagor and mortgagee. In case a mortgagor effects an insurance upon the mortgaged premises the mortgagee can claim no benefit from it unless he can base his claim upon some agreement; and so, in the case of vendor and vendee, it is incumbent on the vendor to show that the insurance was effected for his benefit if he would avail himself of the proceeds. Where this is satisfactorily shown the right of the vendor is unquestionable; for where the assured has agreed to insure for the protection and indemnity of another person having an interest in the subject of the insurance, then such third person has an equitable lien, in case of loss, upon the money due upon the policy to the extent of such interest.[27]

§ 194. **Continued—Rights of option holder.** Ordinarily the holder of a mere option of purchase is not regarded in the same light as a vendee under a bilateral contract, nor will the same rules apply to him that would operate in such latter case; but where an option of purchase is regarded as a substantial interest in land, as is the case in some states, if an insurance against loss by fire exists, or is subsequently effected, and a loss occurs, after which the option is exercised, it seems the purchaser will be entitled to the moneys due upon such insurance.[28]

§ 195. **Continued—Effect of proviso respecting insurer's interest.** A familiar provision in most policies of insurance is that if the interest of the assured in the property be other than the entire, unconditional and sole ownership the policy shall be void. This clause is important where a sale still remains executory. The questions which have arisen under

[26] Cromwell v. Ins. Co., 44 N. Y. 42.

[27] Cromwell v. Ins. Co., 44 N. Y. 42; Providence Bank v. Benson, 24 Pick. (Mass.) 204; Ellis v. Krentsinger, 27 Mo. 311.

[28] Peoples Ry. Co. v. Spencer, 156 Pa. St. 85.

this clause seem mainly to relate to the interest of the vendee and to insurances which he has attempted to make for the protection of such interest. The general rule would seem to be that a vendee has an insurable interest as well as the vendor and where a vendee is in possession and exercising acts of ownership under an executory contract of purchase, notwithstanding a portion of the purchase money is still unpaid, he is yet to be regarded as the "unconditional and sole owner," and as such entitled to recover for the loss of an insured building situated upon the land.[29]

The reasoning by which the foregoing rule is reached proceeds upon the lines heretofore indicated, that is, that the vendee is the real owner and the vendor but a trustee of the title, and that where one person binds himself unconditionally to pay a certain price for a piece of land and takes possession thereof, and the other binds himself to make a deed upon the payments being made, if nothing remains to be done but for the party taking possession to make the payments and for the other party to make the deed, then such contract constitutes a sale of the land within the meaning of the policy.[30]

§ 196. Effect upon insurance of proviso against sales. There is now usually inserted in policies of insurance a special provision which recites that the policy shall be void if the property insured is sold and conveyed without the written permission of the insurer. Inasmuch as nearly every sale of improved realty contemplates a transfer of the insurance thereon as well, this provision becomes important in this connection. The object of the proviso seems to be to protect the insurer from a continuing obligation to the assured, if the title and beneficial interest should pass to others whom he might not be equally willing to trust; therefore, its effect is to annul the contract where a sale of the proprietary interest is made to a third person.[31]

It would seem, however, that while a transfer of the property by the assured to a third person, unless assented to by

[29] Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; Johannes v. Standard Fire Office, 70 Wis. 196; Loventhal v. Home Ins. Co., 112 Ala. 108; Dupreau v. Hibernian Ins. Co., 76 Mich. 615.

[30] Davidson v. Hawkeye Ins. Co., 71 Iowa 532.

[31] Hoffman v. Ins. Co., 32 N. Y. 405.

the insurer, will have the effect to vitiate the policy, a sale by one joint owner to another of his interest in the property does not come within the operation of the rule, and is not a cause of forfeiture within the intent and import of the provision against sales.[32] The design of the provision is not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured. A sale between joint owners makes no substantial change material to the risk, and none within the intent of a simple proviso against alienation.[33]

§ 197. **Continued—Assignment of policy.** The rule is well settled that a policy of fire insurance is a personal contract with the assured; that it does not run with the property insured, and will not pass to a purchaser of such property unless assigned with the assent of the insurer,[34] and further, that unless so assigned it expires with the transfer of the estate of the assured.[35]

The assignment of the insurance is, however, an incident of nearly every transfer of improved real property, and when the consent of the company has been given the practical effect is to constitute an independent contract with the purchaser and assignee, the same as if the policy had been reissued to him upon the terms therein expressed; in other words it is substantially the same as if a new policy had been issued embracing the terms of the old.[36]

§ 198. **Effect of condemnation proceedings.** Where land is condemned after sale, such proceedings in effect operate as a sale of the condemned portion by the vendee—a forced sale, it is true, but practically the same in general effect, as though made voluntarily and through the negotiation of the vendee. The damages in such case accrue to the vendee as the real owner of the property. The legal title held by the vendor is regarded only as a security for the payment of the purchase money; and the relation of the parties, so far as respects the right to claim and hold such damages, is not substantially

[32] Tillou v. Kingston Ins. Co., 7 Barb. (N. Y.) 570; Buffalo Engine Works v. Ins. Co., 17 N. Y. 412.

[33] Hoffman v. Ins. Co., 32 N. Y. 405.

[34] Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; Nordyke, etc., Co. v. Gery, 112 Ind. 535; Cummings v. Ins. Co., 55 N. H. 457.

[35] Continental Ins. Co. v. Munns, 120 Ind. 30.

[36] Continental Ins. Co. v. Munns, 120 Ind. 30; Steen v. Ins. Co., 89 N. Y. 315.

different from what it would have been if the vendor had given a deed and taken back a mortgage, except that where only a contract is given the vendor can insert terms reserving to himself a more efficient remedy in case of default in payment. But while the damages belong in equity to the purchaser, yet when paid in money, if the security of the vendor would be impaired by the purchaser's receipt of the same, he may insist that they shall not be paid until his security has been increased to that extent; and the purchaser will have a corresponding right to security if about to be placed in jeopardy by the payment of the damages to the vendor.[37]

§ 199. **Effect of mechanics' liens.** The adjustment of the rights of the parties and their relations, respectively, with respect to liens incurred after sale and before conveyance have been productive of considerable diversity of opinion; but in the main the rule may be stated, with regard to mechanics' liens, as follows: Where the owner of land gives a contract for a deed to the purchaser, who procures a building to be erected on the premises, the lien of the mechanic attaches only upon the purchaser's interest, and the vendor cannot be required to part with his title until he first receives full payment of the purchase money.[38] But the vendor must do nothing to authorize the vendee to improve the premises; and if improvements are made, they must, to come within the foregoing rule, be made by the vendee on his responsibility. In such event the mechanic's lien will be confined exclusively to the purchaser's interest.

But where the vendor by his contract of sale expressly authorizes the vendee to make erections and improvements on the premises, and particularly if he agrees to advance money to aid in such improvements, and, before any termination of the contract and notice thereof, a mechanic performs labor or furnishes materials in the erection of buildings on the land, the latter will not be required to look alone to the title held by the vendee, but may enforce his lien against the legal as well as the equitable title.[39]

[37] Stevenson v. Loehr, 57 Ill. 509. Hayes v. Fessenden, 106 Mass. 228; Walker v. Burt, 57 Ga. 20.

[38] Hickox v. Greenwood, 94 Ill. 266; Johnson v. Pike, 35 Me. 291;

[39] Henderson v. Connelly, 123 Ill. 98; Hilton v. Merrill, 106 Mass. 528.

CHAPTER VII.

AGENTS AND BROKERS.

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§ 200. General principles. It is not an exaggeration to say that fully one-half of all the voluntary transfers of real property that are daily made in the United States are effected through the intervention of agents and brokers. In every city of any size they form a distinct class of the business com-

munity, while every country hamlet can show at least one or two individuals who, in addition to their other avocations, pursue this branch of trade as one of their methods of livelihood. It is not strange, therefore, that they have long since been recognized by the courts, nor that a vast body of case law should have been built up in the determination of the various questions growing out of their peculiar calling.

The relation of agency is created where one party is authorized to do certain acts for, or in respect to the rights or property of, another—the former being called the *agent,* the latter the *principal.* The acts to be performed may be executed in the name of the principal or in the name of the agent for the principal, while the authority may be conferred antecedently or inferred from subsequent ratification of the agent's acts. In its broadest sense the term agent is made to cover almost every species of fiduciary; but in its strict application to sales of real property it is generally held to mean only those who assume to act in the place of another under express or implied powers, and is distinguished from broker, or other fiduciaries who simply act as middle-men or negotiators. In many transactions the agent acts only in the latter capacity, however, and in such event he is properly a broker and not an agent.

While the powers and authority of an agent enable him to act for and in the place of his principal, the authority of the broker employed to sell real property is usually limited to the power of finding a purchaser satisfactory to the principal; and such will be implied from his vocation, although if the language of the principal used in making the employment clearly shows that he intended to give him a power more extensive than that of a mere broker, and to clothe him with authority to exercise the powers of an agent, and to bind the principal by a written memorandum of sale, the courts will enforce a written contract made by him in pursuance of the agency.[1]

§ 201. **Who may act as agent.** Every person possessing sufficient capacity to act for himself may properly represent

[1] Rutenberg v. Main, 47 Cal. 213. Strictly speaking, a broker is a mere "negotiator," "middle-man" or "go-between." Henderson v. State, 50 Ind. 234; and see Braun v. Chicago, 110 Ill. 186.

another as an agent;[2] and even where civil disabilities may intervene to prevent or disqualify a person from contracting in his own name he may nevertheless act for one to whom such conditions do not apply;[3] and, as a rule, any one, except a lunatic, imbecile or child of tender years, may be an agent for another.[4] Thus, a married woman,[5] even though incapacitated to contract for herself, or a minor,[6] if of sufficient understanding, may, if properly authorized, make valid and binding contracts for another; but an insane person, having neither the understanding to receive instructions nor the judgment necessary for the proper exercise of discretion, is for that reason incapable of assuming the relation, and the same is true of all persons similarly situated. It is essential, however, that the agent be a third person, for neither of the contracting parties can act as the agent of the other.

§ 202. **Continued—Trustee as agent.** The rule is fundamental that a trustee is, by the general principles of law, precluded from purchasing the trust property for his own benefit, or of exercising any acts in relation thereto incompatible with his duty as such trustee. He cannot take upon himself any adverse employment or have any antagonistic interest that would be liable to expose his trust to abuse or fraud. Hence, it has been held that, as he cannot buy on his own account, it follows that he cannot be permitted to buy as the agent of a third person.[7]

§ 203. **Appointment and authority.** To effectuate a binding sale or purchase of real property, the memorandum which the law requires as an evidence of the transaction must be signed by the party to be held or by his agent thereunto lawfully

[2] Lea v. Bringier, 19 La. Ann. 197.

[3] Lang v. Waters, 46 Ala. 264; Stall v. Meek, 70 Pa. St. 181. The reason for this distinction between principals and agents is, that the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapacities or disabilities as are involved in coverture, infancy, etc., or to any other person who, by law, may claim any interest of such disabled persons after their death. 1 Evans' Agency, 16.

[4] Lyon v. Kent, 45 Ala. 656.

[5] Singleton v. Mann, 3 Mo. 464 (orig. pg.); Butler v. Price, 110 Mass. 97; Pullman v. State, 78 Ala. 31.

[6] Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436.

[7] Building Ass'n v. Caldwell, 25 Md. 420.

authorized. In some states, as a safe-guard against fraud and the unauthorized acts of persons claiming to represent the principals to the agreement, the authority by which the agent assumes to act must itself be evidenced by a writing; but in many—perhaps a majority—of the states this additional precaution is not required.

Not infrequently, however, the question of authority sinks into minor importance in view of other facts and circumstances surrounding the transaction, and notwithstanding that an appointment in writing is by statute an essential requisite to enable an agent to make a valid and binding contract, its legal effect may be obviated by the attitude of the parties. Thus, the question of authority becomes immaterial where the sale is made in the presence of the principals, the money paid at the same time, and the purchaser let into possession. In such case, if a contract of sale is subsequently made in the name of the agent, the vendor would be estopped from denying the validity of the sale simply because such agent was not authorized in writing to execute same.[8]

Ordinarily, if one acts for and in behalf of another it is immaterial to the question of agency, so far as third persons are concerned, whether he acts by the direction and request of his principal or by his permission merely, for he is equally an agent in both cases; yet in the construction of powers exercised by an agent in the purchase or sale of land, a stricter interpretation is usually had than prevails in other affairs of business or in transactions wholly related to chattels. Where a writing is required the authority to sell must be clear and explicit, and of such a character that a fair and candid person can see without hesitation that the authority is given. There is an important distinction between an authority to find a purchaser and an authority to execute a contract of sale, which is constantly recognized and applied by the courts, and specific performance has often been refused where the transaction disclosed that the agent's powers were limited to the mere finding of a purchaser. Thus, the expression, "I will sell,"

[8] Karns v. Olney, 80 Cal. 90. It is a well-settled rule that one who with knowledge accepts the proceeds of an unauthorized sale of his property is estopped to deny the validity of such sale. See France v. Haynes, 67 Iowa 139; Moore v. Hill, 85 N. C. 218; Goodman v. Winter, 64 Ala. 433; Field v. Doyon, 64 Wis. 560.

or its equivalent, accompanied by a specification of terms, does not confer any authority on an agent to make a contract of sale;[9] neither does a correspondence between the owner and agent concerning the property, or the price and terms of sale confer any such authority.[10]

And generally, whenever a formal instrument conferring authority upon an agent is employed, it is to be strictly construed. It will be held to include only the powers expressly given, and such others as are necessary and essential to carry into effect those which are expressed.[11]

The same general principles that relate to the appointment of agents by a writing apply with equal force where the power to sign the name of a principal to a contract of sale may be given verbally; and in every instance the words used must be unequivocal in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker.[12] For this reason it has been held that a verbal authority given to an agent "to sell," or "to close a bargain," when applied to real property, amounts to nothing more than a mere authority to find a purchaser at the price mentioned, and confers no power on the agent to sign the principal's name.[13]

A person may as well become an agent by adoption as by original appointment; and where a person has assumed authority to act, and such actions have with full knowledge of the facts been ratified or confirmed by the principal, such person will become an agent, for all practical purposes, as fully empowered as though he had been previously appointed.[14]

[9] Bosseau v. O'Brien, 4 Biss. (C. Ct.) 395; Grant v. Ede, 85 Cal. 418.

[10] Bosseau v. O'Brien, 4 Biss. (C. Ct.) 395. Where the authority of an agent to sell land is required by the statute to be evidenced by a writing, that requirement is not fulfilled by letters written by the owner of the property to third persons showing merely that a certain real estate agent was employed by him to solicit and negotiate for prices; nor by a telegram to such agent to "hold on," in reply to one from him asking if he would take a certain price. Albertson v. Ashton, 102 Ill. 50.

[11] Gilbert v. How, 45 Minn. 121.

[12] Duffy v. Hobson, 40 Cal. 240.

[13] Duffy v. Hobson, 40 Cal. 240; Milne v. Kleb, 44 N. J. Eq. 378.

[14] Gulick v. Grover, 33 N. J. L. 463; Adams v. Power, 52 Miss. 828; Sentell v. Kennedy, 29 La. Ann. 679; Harrison v. McMurray, 71 Tex. 122.

An agent acting under parol authority only cannot bind his principal by a written covenant under seal, signed with the name of such principal;[15] but should he execute a contract under seal, such seal, if not essential to the validity of the contract, should be regarded as mere surplusage, and the contract be held good as a simple contract.[16] So, also, although an authority under seal is necessary to enable an agent to bind his principal by a contract under seal, yet a sealed contract not so authorized may be ratified by acts *in pais,* and so become obligatory on the principal, provided it is not one of those contracts which the law requires shall be under seal.[17]

§ 204. **Proof of authority.** Even as an agent in order to bind his principal must have authority to act, so also persons dealing with him are bound at their peril to know this. Whether the authority be verbal or written they must inform themselves of its nature and extent, and must understand its legal effect.[18] For this reason, where the name of a party to a contract has been signed by a person representing himself to the other party as an agent, and the person whose name has thus been signed especially denies the authority in a suit to enforce it, the burden of showing authority in the agent to sign the name of the principal, or a subsequent ratification by him, falls on the party who seeks to enforce the contract.[19]

As a general rule, agency may be proved either directly, as by express words of appointment, whether uttered orally or contained in some writing;[20] or indirectly, as by evidence of the relative situation of the parties, and their habit and course

[15] Harshaw v. McKesson, 65 N. C. 688.

[16] Long v. Hartwell, 34 N. J. L. 116; Adams v. Powers, 52 Miss. 828; Baum v. Dubois, 43 Pa. St. 265.

[17] Adams v. Power, 52 Miss. 828. And see Baum v. Dubois, 43 Pa. St. 265; Riley v. Minor, 29 Mo. 439; Dickerman v. Ashton, 21 Minn. 538.

[18] Davidson v. Porter, 57 Ill. 300; Ins. Co. v. Poe, 53 Md. 28; Rawson v. Curtis, 19 Ill. 456; Cooley v. Perrine, 41 N. J. L. 322. The purchaser may always refuse to buy until the agent produces such evidence of his authority as to leave no doubt of its extent.

[19] Emmons v. Dowe, 2 Wis. 322; Tribune Co. v. Bradshaw, 20 Ill. App. 17.

[20] Where letters written by the owner of land are relied on as conferring an authority to sell the same, they will be construed, with reference to the surrounding facts and circumstances, in determining whether they were in fact intended

of dealing, or it may be implied from circumstances or from subsequent ratification.[21] It cannot be proved by the mere declarations of the agent, when the fact of agency is in issue.[22]

In every case where a purchaser, relying upon an agent's authority, seeks to enforce a contract made under it, the proof to establish the power of the agent must be clear, certain and specific.[23]

The question as to whether an agent has the requisite authority to bind his principal is a question of law for the court; and this is equally true whether such authority is sought to be sustained by a previous authorization or by a subsequent ratification.[24]

§ 205. Authority resting in parol. As has been previously stated, it is one of the general doctrines of agency that the authority of an agent to act for his alleged principal may be inferred from circumstances, and does not, in the absence of statutory rules to the contrary, require direct evidence to establish it;[25] and that agency, as a question of fact, may be proved by the acts, declarations or conduct of the parties, even though the agent was appointed by power of attorney.[26] This doctrine, which had its origin in transactions concerning chattels, and which still continues to find its most numerous illustrations in matters growing out of chattel interests, should be sparingly applied when sales of land are in question; for it not only affords an avenue for the introduction of fraud,

to authorize the party addressed to make a sale. Bissell v. Terry, 69 Ill. 184. Where a real-estate broker wrote: "We have a customer who would buy your lot if offered at a fair price," and asking the owner to state the best price and the terms for which he would sell, and pay their commission, which was stated; and the owner answered by letter stating the price, and, in part only, the terms for which he would sell, and that he would pay their commission—the broker was not thereby constituted the agent of the owner, with power to bind him by a contract of sale. Stillman v. Fitzgerald, 37 Minn. 186.

[21] Mabley v. Irwin, 16 Ill. App. 362; Hull v. Jones, 69 Mo. 587; Harrison v. McMurray, 71 Tex. 122.

[22] Proctor v. Tows, 115 Ill. 138; Whiteside v. Margarel, 51 Ill. 507; Central, etc., Co. v. Thompson, 122 Pa. St. 118.

[23] A bare preponderance of the evidence will not be sufficient. Proudfoot v. Wightman, 78 Ill. 553.

[24] Gulick v. Grover, 33 N. J. L. 463.

[25] Hull v. Jones, 69 Mo. 587.

[26] Columbia, etc., Co. v. Geise, 38 N. J. L. 39.

but, in its general features, is opposed to the policy of the law governing the disposal of real property. It applies more directly to subsequent than to antecedent circumstances, and in some cases is a rule of necessity; as where, with knowledge of the facts, the principal acquiesces in the acts of the agent under such circumstances as would make it his duty to repudiate them, such acquiescence is taken as a confirmation of the acts of the agent equivalent to authority antecedently conferred;[27] and even such knowledge may be inferred from the facts of the case.[28]

A single act of an assumed agent, and a single recognition of his authority, may under certain circumstances be enough to prove agency to do similar acts;[29] but agency will not generally be presumed from a previous employment in a similar matter.

Authority to make a written contract is not conferred, where the thing to be sold is land, by giving an agent a mere power to sell.[30]

§ 206. **Authority in writing.** Where by law the authority of an agent must rest in writing, parol testimony should be excluded for the same reasons that deny its admission when the contract itself is in dispute. The provision relative to the authorization of the agent is, in such case, as much a part of the statute of frauds as the provisions which relate to the memorandum; and, as parol testimony is refused in the one case, so also should it be in the other. And even where the written authorization of an agent is not a statutory requirement, if there is proof that the appointment was in writing, and there is a question as to the extent of the power, the paper itself must be produced or accounted for. The agency cannot be proved by parol testimony of the contents of the paper, or by circumstantial evidence tending to show that such agency did in fact exist.[31]

[27] Alexander v. Jones, 64 Iowa 207; Goss v. Stevens, 32 Minn. 472; Silverman v. Bush, 16 Ill. App. 437; Reynolds v. Collins, 78 Ala. 94.

[28] Curry v. Hale, 15 W. Va. 867.

[29] Wilcox v. R. R. Co., 24 Minn. 269.

[30] Morris v. Ruddy, 20 N. J. Eq. 238; Shepherd v. Hedden, 29 N. J. L. 343; Duffy v. Hobson, 40 Cal. 240.

[31] Neal v. Patten, 40 Ga. 363; compare Columbia, etc., Co. v. Geise, 38 N. J. L. 39.

Where the written authority of an agent to sell the lands of his principal is required by the statute of frauds, it must receive the same strict interpretation as ordinary written powers—such as letters of attorney or letters of instruction—in which the authority is never extended beyond that which is given in terms, or is absolutely necessary for carrying into effect that which is expressly given.[32]

§ 207. **Telegram as authority.** During very recent years the introduction and general use of the telegraph has somewhat modified the rules of law in regard to writings, and by general consent telegrams have been accorded the same relative place as letters and other writings not under seal. Hence, an authorization by telegraph may properly be considered as an authorization in writing; and where an owner of land, on being notified of an offer to purchase and learning all the facts, sends a telegram to his agent to accept the offer and make the sale, he will be bound by a contract of sale made by his agent as directed.[33]

§ 208. **General and special agents.** A distinction is made between general and special agents. The former, having a wide scope both of duty and authority, represents his principal in all matters within the ordinary limits of the principal's business, and this may be in one or more places; the latter is one whose authority is definitely limited, and whose duty is specified.[34] It is said, that if a general agent, acting within the limits of his business, violates instructions received from the principal, the principal alone will be liable to third parties; but, if a special agent violates instructions, the principal will not be liable.[35] It would seem, however, that the distinction between general and special agents is of little or no practical value as far as respects the rights of third persons.

The law indulges in no presumptions respecting the character of an agency, and whether an agent is general or special is a question of fact for the jury.[36]

Agencies in respect to contracts for the sale or conveyance

[32] Bissell v. Terry, 69 Ill. 184; Gilbert v. How, 45 Minn. 121.

[33] Chappell v. McKnight, 108 Ill. 570.

[34] Cruzan v. Smith, 41 Ind. 288.

[35] Cruzan v. Smith, 41 Ind. 288; Baxter v. Lamont, 60 Ill. 237.

[36] Dickinson Co. v. Miss. Valley Ins. Co., 41 Iowa 286.

of land are usually to be classed as special, such agencies being generally created for a particular and defined purpose; and in the construction of the powers delegated to such agents courts are ever inclined to be strict. The business of buying and selling realty differs in many respects from ordinary mercantile transactions, and many of the rules that possess efficacy when invoked in respect to such transactions are inapplicable to determine questions raised by the relation which characterizes a real estate agent and his principal. This is particularly true in respect to general agency, which finds but few illustrations where the subject-matter of the agency is real property. The agency may, however, be general, as in any other line of commerce where intermediaries and representatives are necessarily employed; and where an authority is given to an agent to buy lands in a certain locality and its vicinity, and to buy generally from whomsoever he may see fit, no single transaction being in view but a number of separate transactions, this would probably constitute, for certain purposes at least, a general agency.[37]

If the agent is appointed only for a particular purpose and is invested with limited powers, or, in other words, is a special agent, then it is the duty of persons dealing with such agent to ascertain the extent of his authority; and the principal will not be bound by any act of the agent not warranted by or fairly and necessarily implied from the terms of the authority delegated to him.[38] But in the application of this rule to cases affecting the rights of third persons who have dealt with the agent in good faith, care must be taken not to bind them by limitations placed on the authority of the agent by the private instructions of the principal, which are not known to such third persons, nor properly inferable from the nature of the agent's employment.[39] Yet, as before remarked, it is the duty of persons dealing with an agent to ascertain the extent of his authority; and usually where an agent exceeds his powers the contract will not be binding upon the principal, and where an action is brought upon the contract the real question involved has respect only to the extent of the agent's

[37] Butler v. Maples, 9 Wall. (U. S.) 776.

[38] Cooley v. Perrine, 41 N. J. L. 322; Baxter v. Lamont, 60 Ill. 237; Peabody v. Hoard, 46 Ill. 242.

[39] Lister v. Allen, 31 Md. 543.

authority, and not to the other contracting party's knowledge of it.[40]

§ 209. **Implied powers.** An agent to sell, in the absence of particular instructions, has the power to do what is usual and necessary in effecting such sales according to the ordinary mode of doing business.[41] He may enter into a contract, within the terms of his authority, which will bind his principal[42]—this being of the very essence of an authority to sell—and generally may perform all such acts as naturally and logically follow the employment.[43] Under a power to purchase land and to subdivide and plat the same, the agent may bind his principal by the dedication of land for the uses of a street.[44]

§ 210. **Agent must pursue his authority.** While all the acts of an agent, performed under the direction of his principal and within the scope of his agency, will bind the principal and be regarded as the principal's own acts, yet to effect this the agent must act within the authority conferred.[45] If he be empowered to sell his principal's land in a specified manner, at a particular time and place and on certain terms, such terms, time and place must be strictly observed.[46] Yet, though the agent departs from his instructions, if the unauthorized act is done in the execution of a power conferred, but in a mode not sanctioned by the power and in excess or misuse of it, the principal may still be bound by ratification; and this may be inferred from slight acts of confirmation on his part. His duty to disaffirm at once is imperative in such cases.[47]

An agent's powers cannot be enlarged by implication where his authority is in writing; for every instrument by which an agency is created for a special, particular and defined purpose

[40] Dickinson Co. v. Miss. Valley Ins. Co., 41 Iowa 286.

[41] Herring v. Skaggs, 62 Ala. 180; Mfg. Co. v. Givan, 65 Mo. 89.

[42] Haydock v. Stow, 40 N. Y. 363.

[43] Barteau v. West, 23 Wis. 416.

[44] Barteau v. West, 23 Wis. 416.

[45] Baxter v. Lamont, 60 Ill. 237; Yazel v. Palmer, 88 Ill. 597. The presumption is that one known to be an agent is acting within the scope of his authority. Brett v. Bassett, 63 Iowa 340.

[46] Thornton v. Boyden, 31 Ill. 200. An agent authorized to sell for $1,500, if at once, said he could not, and asked for lower terms. After a month, with no further authority, he sold for $1,500. *Held*, that the sale was unauthorized. Matthews v. Sowle, 12 Neb. 398.

[47] Meyers v. Life Ins. Co., 32 Hun (N. Y.) 321; Hart v. Dixon, 5 Lea (Tenn.) 336.

is to be construed strictly; nor will the introduction of formal language in the letter of appointment, tending to show ample powers, vary or affect the application of this rule. Thus, in an appointment by letter of attorney stating the powers and duties of the agent, the formal clause, "giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises," etc., while conferring apparently unlimited power if read by itself, must nevertheless be presumed to be used in subordination to the particular subject-matter of the power, and limited accordingly.[48]

A substantial compliance, or a compliance which involves no material deviation from the instructions given, will usually be considered a sufficient pursuance of the authority; as, where an agent is authorized to sell land, one-half payable on or before one year, a contract to sell, "one-half payable in one year," is in pursuance of the authority, the legal rights of the vendor being the same in either case.[49]

§ 211. **Agent's liability for breach of instructions.** An agent is bound to execute the orders of his principal, whenever he has undertaken to perform the same, unless prevented by some unavoidable accident without fault on his part, or unless such orders require the performance of an illegal or immoral act; and in the performance of the duty he has undertaken he is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business.[50] He is responsible for all loss occasioned by any violation of his duty, either in exceeding or disregarding his instructions;[51] and it is no excuse that, in so doing, he intended to act for the benefit of his principal.[52] A violation by an agent of the positive instructions of his principal is gross negligence, and renders him liable for such loss or damage as may result from it; and in such case every doubtful circumstance is construed against him.[53]

[48] Jenkins v. Funk, 33 Fed. Rep. 915.

[49] Deakin v. Underwood, 37 Minn. 98.

[50] Heineman v. Heard, 50 N.Y.27.

[51] Rechtscherd v. Bank, 47 Mo. 181; Williams v. Higgins, 30 Md. 404; Adams v. Robinson, 65 Ala. 586.

[52] Rechtscherd v. Bank, 47 Mo. 181.

[53] Adams v. Robinson, 65 Ala. 586.

§ 212. **Continued—For misconduct.** The person who bargains to render services for another is deemed in law to undertake in good faith and integrity the performance of his duties, and is liable in damages to his employer for negligence, bad faith or dishonesty. For gross misconduct in the course of his agency or intentional frauds upon his principal, he may be held to have forfeited all right to compensation as respects any of the business of the principal into which such fraud or misconduct shall have entered;[54] and it seems that the right of a principal to insist that his agent has forfeited his right to compensation by reason of intentional gross misconduct and fraud cannot be dependent upon the principal's ability to show the precise extent of the injury to him on account of such misconduct by facts and figures.[55]

§ 213. **Not liable for errors of judgment.** While an agent acting under express instructions is liable for the damages resulting from a wilful disregard of the same, yet where he is clothed with a general discretion in the management of the business intrusted to him he will not be held responsible for an honest mistake in its exercise, provided he acts with reasonable skill and ordinary diligence.[56]

§ 214. **Ratification of unauthorized agency.** The ratification of an act of another done in an assumed capacity of agent, though without any precedent authority, creates the relation of principal and agent; and the principal becomes bound by the act to the same extent as if it had been done by a previous authorization.[57] In like manner, notwithstanding an agent exceeds his authority, if the principal nevertheless accepts the benefits of the agent's acts, or, with full knowledge of them subsequently attained, fails to repudiate them, he will be held responsible.[58]

But before a person can be bound by ratification of an act

[54] Prescott v. White, 18 Ill. App. 322.

[55] Prescott v. White, 18 Ill. App. 322.

[56] Schmidt v. Pfau, 114 Ill. 494.

[57] Gulick v. Grover, 33 N. J. L. 463; Vincent v. Rather, 31 Tex. 77; Adams v. Power, 52 Miss. 828; Roby v. Cossitt, 78 Ill. 638; Sentell v. Kennedy, 29 La. Ann. 679; Goss v. Stevens, 32 Minn. 472; Hankins v. Baker, 46 N. Y. 666.

[58] Williams v. Storm, 6 Coldw. (Tenn.) 203; Maddux v. Bevan, 39 Md. 485; Watterson v. Rogers, 21 Kan. 529; Davis v. Krum, 12 Mo. App. 279; Workman v. Cuthrie, 20 Pa. St. 495; Brock v. Jones, 16 Tex.

done in his behalf, it must appear that he was informed of all the material facts in the transaction;[59] and, if his assent has been obtained while ignorant of those facts, he will be at liberty to disaffirm when informed of them.[60]

The principal, when informed of the unauthorized acts of his agent with respect to his property, must within a reasonable time elect to approve or disaffirm them. It is not necessary, however, that there should be an express ratification to bind the principal; but a subsequent assent may be inferred from circumstances which the law considers equivalent to an express ratification.[61] Thus, the act of an agent may be presumed to have been ratified by his principal when the acts and conduct of the latter are inconsistent with any other supposition;[62] and silence will, ordinarily, be considered as equivalent to approval.[63] Yet, while the failure of the principal to repudiate within a reasonable time the acts of his agent, when informed of them, will be construed into an acquiescence, the rule is always liberally applied. Mere failure on his part to disavow an agent's acts instantly on being apprised thereof is not in itself a ratification;[64] but he must act promptly, and if with full knowledge of the facts he ratifies his agent's acts,

461; Fisher v. Willard, 13 Mass. 379; Jones v. Atkinson, 68 Ala. 167; Weisiger v. Wheeler, 14 Wis. 101.

[59] Kerr v. Sharp, 83 Ill. 199; Bosseau v. O'Brien, 4 Biss. (C. Ct.) 395; Rowan v. Hyatt, 45 N. Y. 138; Hovey v. Brown, 59 N. H. 114; Dean v. Bassett, 57 Cal. 640; Lester v. Kinne, 37 Conn. 9; Bannon v. Warfield, 42 Md. 22; Roberts v. Rumley, 58 Iowa 301.

[60] Bannon v. Warfield, 42 Md. 22; Lester v. Kinne, 37 Conn. 9; Dean v. Bassett, 57 Cal. 640; Roberts v. Rumley, 58 Iowa 301.

[61] Searing v. Butler, 69 Ill. 575. Where an agent sold land without authority, but the principal made no objection for four years, during which time the purchasers had improved the land, and during three years of which the agent had resided in the same town with his principal, when he at length absconded without having paid his principal any of the purchase money, *held*, that there was a ratification of the sale. Alexander v. Jones, 64 Iowa 207. And see Hammond v. Hannin, 21 Mich. 374; Meyer v. Morgan, 51 Miss. 121.

[62] Beidman v. Goodell, 56 Iowa 592; Hauss v. Niblack, 80 Ind. 407. As when he receives and holds the fruit of the agent's act. Maddux v. Bevan, 39 Md. 485. Or brings a suit to enforce his agent's contract. Benson v. Liggett, 78 Ind. 452; and see Reid v. Hibbard, 6 Wis. 175.

[63] Meyer v. Morgan, 51 Miss. 21; Hawkins v. Lange, 22 Minn. 557; Kehlor v. Kemble, 26 La. Ann. 713; Breed v. Bank, 6 Colo. 235.

[64] Miller v. Stone Co., 1 Ill. App. 273.

even for a moment, he is bound by them.[65] An election once made is irrevocable.[66]

The maxim that ratification is equivalent to precedent authority applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent.[67]

§ 215. Effect of ratification as respects purchaser. But while a principal may be bound by the subsequent ratification of an unauthorized act on the part of an agent, it has been held by one line of authority that the other party may refuse to consummate the transaction and repudiate the contract. As a reason for this doctrine it is said that if the principal was not bound by the agreement of the agent when he made it, then the contract is void for want of mutuality, and the subsequent acts of the principal affirming the authority of the agent cannot validate the contract so as to bind the other party without his assent. The rule of law undoubtedly is that both parties should be bound by the contract or neither should be bound, and that the rule is a just one none can deny; and it clearly stands to reason that, where one party was not bound by a contract when it was entered into by one claiming to be his agent, but who in fact was not such agent and had no authority to bind his principal, such party should not be allowed afterwards, when he finds the contract advantageous to him, to affirm the contract made on his behalf by such unauthorized person and compel the other party to perform it on his part.[68]

Yet, while the principles just stated find support and affirmance in the decisions of several courts of the highest standing, the weight of authority seems to bear in an opposite direction. It has been suggested that a contract entered into by one of the parties in person and for the other party by an unauthorized agent amounts, practically, to a mere proposal or offer on the part of the former from which he would have a right to recede until it had been ratified or accepted by the other party so as to become binding upon him, and that the other party

[65] Silverman v. Bush, 16 Ill. App. 437.

[66] Andrews v. Ins. Co., 92 N. Y. 596.

[67] Kelsey v. National Bank, 69 Pa. St. 426.

[68] Atlee v. Bartholomew, 69 Wis. 43; and see Townsend v. Corning, 23 Wend. (N. Y.) 435; Wilkinson v. Heavenworth, 58 Mich. 574.

may, within a reasonable time after receiving notice of its existence, elect to accept by a ratification or confirmance of the prior unauthorized act.[69] The rule has further been laid down that the principal, upon being informed of an act of his agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not; and so long as the condition of the parties is unchanged he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid.[70]

§ 216. **Effect of ratification as respects principal.** While it is undoubtedly true that a ratification should be the intelligent act of the principal, given with full knowledge of the facts, yet if a principal adopts the contract of a self-constituted agent who has assumed to act for him without authority, he is charged with the duty of ascertaining the extent to which such agent has assumed to act in his behalf. By adopting such contract he not only assents to whatever may appear in writing, but adopts as his own acts all of the instrumentalities of the agent in securing the contract.[71] The reason for this is that as he seeks to avail himself of the benefits to be derived from the agent's acts so he must assume all the liabilities which attach thereto, as fully as if he had himself induced the contract in the first instance.[72]

Where a principal has expressly repudiated the unauthorized act of his agent, delay in bringing a necessary suit cannot be deemed a ratification.[73]

§ 217. **Agent's signature.** It would seem that, if an instrument which shows on its face the names of the contracting parties is executed by an agent, the agent may sign his own name first, adding "agent for" his principal; or he may sign the name of his principal first, and add "by" himself "as agent."[74] This is undoubtedly the rule in respect to all unsealed instruments; and, as agreements for the sale of lands

[69] See note to Atlee v. Bartholomew, 5 Am. St. Rep. 103.

[70] Andrews v. Life Ins. Co., 92 N. Y. 596; and see Hammond v. Hannin, 21 Mich. 374; State v. Shaw, 28 Iowa 67. This view is also taken by Story. See Story's Agency, § 245 *et seq.*

[71] Busch v. Wilcox, 82 Mich. 336; Shoninger v. Peabody, 57 Conn. 42.

[72] Morse v. Ryan, 26 Wis. 356; Fitzsimmons v. Joslin, 21 Vt. 142.

[73] McClure v. Evartson, 14 Lea (Tenn.) 495.

[74] Smith v. Morse, 9 Wall. (U. S.) 76.

do not ordinarily require a seal, would probably be permitted to prevail, even where the agreement purports to be under seal. A different rule would prevail in case of the execution of powers of attorney where the signature should purport to be that of the principal and not the agent.

Where the contract is signed by the agent with his own signature, though qualified by the word "agent," such addition will ordinarily be regarded as a simple description of the person—furnishing, perhaps, a mode of identification, yet available for no other purpose. Such is the ordinarily-accepted rule when the body of the contract fails to show any additional act of agency;[75] but if, from the entire instrument, it satisfactorily appears that the person executing acts only as an agent and intends to bind his principal and not himself, a liberal construction will be given to it.[76]

§ 218. **Revocation of authority.** A contract of agency may be terminated in a number of ways. Thus, the authority may expire by the limitation of the contract; it may be revoked by the principal, or it may be determined by operation of law. Ordinarily, when an agent is employed to sell land the agency is at an end as soon as a purchaser is obtained.[77]

An agency may be revoked at any time before sale unless coupled with an interest or given for a valuable consideration;[78] and generally where the principal disposes of the subject-matter of the agency, this, by implication of law, will operate as a revocation of the power of his agent to sell the same.[79] But where a party engages the services of another to assist him in making any disposition of his property, if he desires to dispense with such services he should give the other party notice; if he does not and the service is rendered, he will be required to pay for the same.[80]

[75] Hall v. Cockrell, 28 Ala. 507; Crum v. Boyd, 9 Ind. 289; Forster v. Fuller, 6 Mass. 58; Sayre v. Nichols, 5 Cal. 487; Bingham v. Stewart, 13 Minn. 106.

[76] See Sturdivant v. Hull, 59 Me. 172; Smith v. Morse, 9 Wall. (U. S.) 76.

[77] Short v. Willard, 68 Ill. 292; Moore v. Stone, 40 Iowa 259.

[78] Brown v. Pforr, 38 Cal. 550; Chambers v. Seay, 73 Ala. 372; Simpson v. Carson, 11 Ore. 361; Haydock v. Stow, 40 N. Y. 363.

[79] Bissell v. Terry, 69 Ill. 184; Wells v. Hatch, 43 N. H. 246; Brown v. Pforr, 38 Cal. 550.

[80] Bash v. Hill, 62 Ill. 216.

After revocation of an agent's authority the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority;[81] but, with regard to third persons, the general rule is that one who has dealt with an agent in a matter within the agent's authority has a right to assume, if not otherwise informed, that the authority continues; and unless notice of revocation is brought home to him the principal will ordinarily be bound if the dealings continue after the authority is revoked.[82]

A principal's insanity, inasmuch as it deprives him of the capacity to act for himself, will also have the effect of a revocation of the authority of his agent, except in cases where a consideration has previously been advanced, so that the power has become coupled with an interest;[83] or where a consideration of value is given by a third person trusting to an apparent authority and in ignorance of the principal's incapacity.[84]

Where two principals jointly appoint an agent to take charge of a matter in which they are jointly interested, a severance of their interest revokes the agency.[85]

§ 219. Agency coupled with interest. As previously stated, the principal may generally terminate the agency at his pleasure, provided that the same is not coupled with an interest in favor of the agent. But if the agent has a direct interest in the subject-matter of the agency or in the execution of the powers thereby conferred, the rule is different, and the principal will not be permitted to revoke the same where such revocation is to the injury of the agent or prejudicial to his interests; and, notwithstanding that he may have attempted so to do, the agent may still continue to act and to fully accomplish the original purpose.[86]

The agent's interest, however, must be tangible—consisting either of some vested right in the subject-matter of the

[81] Kelly v. Phelps, 57 Wis. 425.

[82] McNeilly v. Ins. Co., 66 N. Y. 23; Claflin v. Lenheim, 66 N. Y. 301.

[83] Haggart v. Ranger, 15 Fed. Rep. 860.

[84] Hill v. Day, 34 N. J. Eq. 150.

[85] Rowe v. Rand, 111 Ind. 206.

[86] Varnum v. Meserve, 8 Allen (Mass.) 158; Hutchins v. Hebbard, 34 N. Y. 24; Hynson v. Noland, 14 Ark. 710; Bonney v. Smith, 17 Ill. 531; Wheeler v. Knoggs, 8 Ohio 169; Dougherty v. Moon, 59 Tex. 397.

agency, the land itself, or in the proceeds that may be derived from its sale, and which to a certain extent represent the land. Hence, a mere right to a percentage of the proceeds derived from sale, to be retained by way of compensation, constitutes no interest;[87] nor will expenditures made by the agent in endeavoring to carry out the object of the agency come within the meaning of the rule; but if land be intrusted to another to sell and from the proceeds thus derived to first reimburse himself for moneys theretofore advanced to his principal, or in the satisfaction of a debt of any kind previously contracted, the interest thus acquired attaches to the land in his hands and cannot be divested.

§ 220. **Agent's authority terminates with principal's death.** As an agent is merely a representative, it naturally and logically follows that his powers in this respect are immediately determined upon the death of the person for whom he professes to act. His authority is not revoked, in the proper acceptation of the term, for this implies that it has to be recalled or resumed by the person from whom it emanates, but absolutely ceases, for there cannot be an agent without a principal;[88] and the fact that the agent, in ignorance of his principal's death, has in good faith contracted after that event does not alter the rule or confer upon the other contracting party any additional rights.[89]

§ 221. **Undisclosed principal.** The rule is well established

[87] Thus, a power to sell and receive the proceeds above a certain sum by way of commission is not a power coupled with an interest which cannot be revoked. Simpson v. Carson, 11 Ore. 361. And where the owner of land containing iron ore authorized an agent in writing to sell the land, the agent agreeing to transport specimens of the ore to England, and to receive as compensation "an undivided one-fourth interest in the proceeds of sale when sold as aforesaid,"—*held*, that the agent's authority was not coupled with an interest, and was revocable at any time before sale. Chambers v. Seay, 73 Ala. 372. An agreement as to a certain portion of the net profits to be derived from a sale of land gives the agent no interest in the land. LeMoyne v. Quimby, 70 Ill. 399.

[88] Travers v. Crane, 15 Cal. 12; Davis v. Bank, 46 Vt. 728; Cleveland v. Williams, 29 Tex. 204; Saltmarsh v. Smith, 32 Ala. 404; McDonald v. Black, 20 Ohio 185; Clayton v. Merritt, 52 Miss. 353.

[89] See Galt v. Galloway, 4 Pet. (U. S.) 332; Davis v. Bank, 46 Vt. 728; Travers v. Crane, 15 Cal. 12; Clayton v. Merritt, 52 Miss. 353; Estate of Rapp v. Ins. Co., 113 Ill. 390.

in respect to chattel sales that a principal, although not disclosed by the agent, is nevertheless responsible on the agent's contracts if the latter had power to make them. By contracting in his own name he only adds his personal liability to that of his principal; and the seller, upon discovering the principal, may elect to hold either principal or agent responsible for the price.[90] This doctrine has been held to obtain as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity;[91] and a principal may be charged upon a written executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument, and the party dealing with the agent supposed he was acting for himself.[92] It is somewhat difficult, however, to reconcile this doctrine with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract; and the argument upon which it is supported savors strongly of refined subtlety. Some of the cases proceed upon the qualified theory that a written contract of an agent may be enforced against the principal when it can be collected from the whole instrument that the intention was to bind the principal;[93] but it would seem, from the preponderance of authority, that this qualification is no longer regarded as an essential part of the doctrine.[94] It has further been contended in this connection that if evidence showing an unnamed principal amounts merely to an explanation of the real character of the transaction, and does not in any degree contradict or qualify the provisions and stipulations of the contract itself, and that in all cases where the character in which parties contract is

[90] Youghiogheny Ice Co. v. Smith, 66 Pa. St. 340; Davis v. McKinney, 6 Coldw. (Tenn.) 15; Duvall v. Wood, 3 Lans. (N. Y.) 489; Meeker v. Claghorn, 44 N. Y. 349. But it seems that, where the real principal is known to the seller at the time, but the contract is made in the name and upon the credit of the agent, the contract will be deemed to be with the agent individually, exclusive of liability on the part of the actual principal. Davis v. McKinney, 6 Coldw. (Tenn.) 18.

[91] Dykers v. Townsend, 24 N. Y. 61; Huntington v. Knox, 7 Cush. (Mass.) 371; Coleman v. Bank, 53 N. Y. 393.

[92] Briggs v. Partridge, 64 N. Y. 357.

[93] See Negus v. Simpson, 99 Mass. 388.

[94] See Eastern R. R. Co. v. Benedict, 5 Gray (Mass.) 566; Briggs v. Partridge, 64 N. Y. 357.

not defined on the face of the writing, it is competent to show that one or both of the contracting parties were agents for other persons and acted as such in making the contract, so as to give the benefit of the contract to the unnamed principal.[95]

Nor will any question arise, under a contract made in this manner, with reference to the statute of frauds; for the statute provides that the memorandum shall be signed by the party to be charged or his agent duly authorized, and if executed by the agent pursuant to authority it would, it seems, be a valid execution and the principal would be bound.[96]

A different case is presented when the contract is under seal. Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal; but if the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts *in pais,* and the contract is one which would have been valid without a seal, the principal may be made liable in *assumpsit* upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement.[97]

[95] See 1 Addison, Cont. 42. Chandler v. Cox, 54 N. H. 561, was a case in which the principals were sued upon a contract which was signed by their agent, but which did not upon its face disclose an agency. It was, however, a question of fact whether or not the principals were known to be such at the time the contract was executed. The court, in an able and elaborate opinion, which reviews all the authorities, *held,* that if the principals were not known when the agreement was signed, parol evidence was admissible to show the agency of the signer and to charge the principal; but that if, in point of fact, agency was then disclosed, such evidence tended to vary the writing, and could not be admitted. The ground of the ruling upon the latter point was that if the plaintiff knew, when the contract was entered into, that it was made for the benefit of third parties, the writing showed that they had elected to look to the agent for its performance, and parol evidence was not admissible to vary the writing by showing that they did not so elect.

[96] Lawrence v. Taylor, 5 Hill (N. Y.) 113.

[97] Du Bois v. Canal Co., 4 Wend. (N. Y.) 285; Lawrence v. Taylor, 5 Hill (N. Y.) 107.

The rule is fundamental, however, that those persons only can be sued on an indenture who are named as parties to it, and that no action can lie against one person on a covenant which purports to have been made by another.[98] It is also true that a seal has lost most of its former significance, yet the distinction between specialties and simple contracts has not been obliterated; and in the absence of authority it may safely be asserted that a contract under seal, in those states where a seal is still recognized, may not be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it,[1] on proof *dehors* the instrument that the nominal party was acting as the agent of another.[2]

§ 222. **When agent becomes personally liable.** Where an agent undertakes to contract on behalf of an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he will be personally responsible, as he is presumed in such case to know the exact extent of his authority.[3] This is an elementary rule of the law of con-

[98] Spencer v. Field, 10 Wend. (N. Y.) 88; Townsend v. Hubbard, 4 Hill (N. Y.) 351. In this case it was held that, where an agent duly authorized to enter into a sealed contract for the sale of the land of his principals had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat covenants made by the agent as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in this case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase money; and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained.

[1] Huntington v. Knox, 7 Cush. (Mass.) 374, in which the general rule is declared that, "where a contract is made by deed under seal on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an attorney or agent, it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

[2] This is especially the case in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it. Briggs v. Partridge, 64 N. Y. 357.

[3] Merrill v. Wilson, 6 Ind. 426; Pierce v. Johnson, 34 Conn. 274; Mann v. Richardson, 66 Ill. 481.

tracts; and though modern decisions have in a great measure relaxed the stringency of the older rules relative to undisclosed principals, and permitted an inquiry as to the actual parties, the law in this respect is usually adhered to without deviation.[4]

Where, however, one who has no authority to act as another's agent assumes so to act, and makes a deed or a simple contract in the name of the other, he is not as a rule personally liable on the covenants in the deed or the promise in the simple contract, unless it contains apt words to bind him personally.[5] The remedy in such case is by an action on the case for falsely representing himself to be authorized to bind his principal.[6] It has sometimes been sought, in a case of this character, to bind the agent by the introduction of parol evidence tending to show that in signing the agreement the one who purports to sign as agent signed the name of the principal for his own benefit, and with the intention to bind himself. This, however, has always been denied as being opposed to the fundamental rule that parol evidence cannot be introduced to vary the terms of a written agreement. Nor does this ruling militate against the exception ordinarily allowed in the case of undisclosed principals. In the latter case parol evidence is admitted to show who is meant by the signature; it does not vary the written contract, but only serves to identify the real contracting party. But where the contract discloses the names and relations of the parties; where it purports to be the act of the principal, and where the agent does not assume to bind himself,—to permit to be shown by parol testimony an intention exactly contrary to that expressed on the face of the writing would be a direct violation of a cardinal rule of evidence.

This rule is not without apparent exceptions; and an agent acting without authority will not, it seems, be held personally liable when the want of authority was known to both parties, or even where it was unknown to both parties. See Walker v. Hinze, 16 Ill. App. 326.

[4] See Wheeler v. Reed, 36 Ill. 81; McClellan v. Parker, 27 Mo. 162; Royce v. Allen, 28 Vt. 234.

[5] Abbey v. Chase, 6 Cush. (Mass.) 54; Cole v. O'Brien, 34 Neb. 68; Hall v. Crandall, 29 Cal. 567; Duncan v. Niles, 32 Ill. 532.

[6] Draper v. Steam Heating Co., 5 Allen (Mass.) 338; and see Bartlett v. Tucker, 104 Mass. 339; Grafton Bank v. Flanders, 4 N. H. 239;

§ 223. When principal chargeable with agent's acts. As a general rule a principal is bound by acts and representations of his agent respecting the subject-matter of the agency, if made at the same time as the transaction,[7] and is affected with all the knowledge the agent had in relation thereto.[8] He is not only responsible for those contracts which have been actually made under his express authority, but will be bound as well in those cases where the agent is acting within the usual scope of his employment, or is held out to the public or to the other party as having competent authority, although in fact he has in the particular instance exceeded or violated his instructions and acted without authority.[9] Where the agent's authority is by law required to be in writing, this rule cannot be said to apply; but if no such requirement exists, it will hold good in matters pertaining to the sale of land equally with purely chattel interests. It would seem further, that there is no distinction, in the matter of responsibility, between an agent authorized to do business generally and one employed to conduct a single transaction, if, in each case, he is acting in the business for which he was employed by the principal.[10]

It is said, that the ground upon which the acts and declarations of an agent are admitted in evidence against his principal is, that whatever he says or does in reference to the business in which he is at the time employed, and which is within the scope of his authority, is done or said by the principal. But to bring such statements, representations or admissions within the rule it is essential that they should be made by the agent at the time of the transaction, either while he was actually engaged in its performance or so soon thereafter as to be a part of it.[11]

It is a further rule, however, that before one can be affected by the acts and declarations of another as his agent, the agency must be proved;[12] and where the question is as to the

Weare v. Gove, 44 N. H. 196; White v. Madison, 26 N. Y. 117; Taylor v. Shelton, 30 Conn. 122.

[7] Robinson v. Walton, 58 Mo. 380; Keough v. Leslie, 92 Pa. St. 424; Bennett v. Judson, 21 N. Y. 238; Bank v. Gregg, 14 N. H. 331; Echols v. Dodd, 20 Tex. 190.

[8] Hazleton v. Agate, 11 Rep. 559.

[9] See Story, Agency, § 443.

[10] Haskell v. Starbird, 152 Mass. 117.

[11] Cole v. O'Brien, 34 Neb. 68; Hall v. Crandall, 29 Cal. 567; Duncan v. Niles, 32 Ill. 532.

[12] Gibbs v. Holcomb, 1 Wis. 23; Emmons v. Dowe, 2 Wis. 322.

extent of the agent's powers, it must first be shown that they extend to the acts or declarations in question.[13] Thus, the owner of property is not bound by representations made concerning it, without his authority or knowledge, by one not authorized to make a sale of it, but simply to procure some person to negotiate with the owner.[14]

The acts and declarations of an agent, made after the transaction to which they relate, are not admissible to bind the principal.[15]

§ 224. **Fraud of agent.** The fraud of an agent will be chargeable to the principal whenever he has had the benefit of the fraud,[16] even though he was ignorant of it;[17] and usually whether the agent, representing a material fact, knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial.[18] But generally, to charge the principal with his agent's wrong, the special matter which constitutes the wrongful act must have reference to the particular subject-matter of the employment, and fall strictly within the scope of the agent's authority.[19]

It would seem, however, that where an agent innocently makes a misrepresentation of facts while effecting a contract for his principal, it will not amount to fraud on the part of the principal, though he is aware of the real state of facts, if he was ignorant of the misrepresentations being made and did not direct the making thereof.[20] And it would seem, further, that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a case the vendee may rescind the contract and reclaim the money paid, and if not

[13] Coon v. Gurley, 49 Ind. 199.

[14] Lansing v. Coleman, 58 Barb. (N. Y.) 611.

[15] M. & M. R. R. Co. v. Finney, 10 Wis. 388.

[16] Bennett v. Judson, 21 N. Y. 238; Johnson v. Barber, 10 Ill. 425.

[17] Presley v. Parker, 56 N. H. 409; Bank v. Gregg, 14 N. H. 331; Haskell v. Starbird, 152 Mass. 117; but see Davies v. Lyon, 36 Minn. 427.

[18] Foard v. McComb, 12 Bush (Ky.) 723.

[19] Smith v. Tracy, 21 N. Y. 79; Kennedy v. Parke, 17 N. J. Eq. 415; Echols v. Dodd, 20 Tex. 190; Busch v. Wilcox, 82 Mich. 336; Nichols v. Wadsworth, 40 Minn. 547; Griswold v. Gebbie, 126 Pa. St. 353.

[20] Kelly v. Ins. Co., 3 Wis. 254; and see Davies v. Lyon, 36 Minn. 427.

repaid may sue the vendor for it, or he may sue the agent for deceit.[21]

So, on the other hand, a principal may maintain an action grounded on fraudulent representations made to his agent, whereby a transfer of his property was affected.[22]

An agent may be held responsible for his fraudulent actions by any person in privity with him who has been injured thereby; and where the agent of the owner of property makes representations as to its character and condition which are relied on by the purchaser to his prejudice, and which are in fact false and fraudulent, and unqualifiedly made by such agent as of his own knowledge, the purchaser may maintain an action against him for damages.[23]

§ 225. Notice to agent binds principal. The rule is general that knowledge of the agent is knowledge of the principal, who is chargeable with notice of all facts brought home to the agent while engaged in the business and negotiations of the principal.[24] The rule is based upon the principle that it is the duty of the agent to act for his principal upon such notice or to communicate the information obtained by him to his principal, so as to enable the latter to act upon it.[25] But to charge the principal with implied notice of facts, because they were known to his agent, it is essential that the knowledge shall have been acquired during the existence of the agency,[26] and in connection with the business upon which the agent is

[21] Kennedy v. McKay, 43 N. J. L. 288.

[22] Ward v. Barkenhagen, 50 Wis. 459.

[23] Clark v. Lovering, 37 Minn. 120.

[24] Walker v. Schreiber, 47 Iowa 529; Bank v. Milford, 36 Conn. 93; Whitehead v. Wells, 29 Ark. 99; Pringle v. Dunn, 37 Wis. 449; Allen v. Poole, 54 Miss. 323; Meier v. Blume, 80 Mo. 179; Hovey v. Blanchard, 13 N. H. 145; Farrington v. Woodward, 82 Pa. St. 259; Ross v. Houston, 25 Miss. 591; Backman v. Wright, 27 Vt. 187; Roach v. Carr, 18 Kan. 529; Taylor v. Young, 56 Mich. 285.

[25] Frenkel v. Hudson, 82 Ala. 158; Pringle v. Dunn, 37 Wis. 449; Hummel v. Bank, 75 Iowa 689. The rule that a purchaser is in equity chargeable with constructive notice of the contents of a deed which came to the knowledge of his agent in the investigation of the title does not apply as between the vendor and the purchaser; it applies only as between the purchaser and third persons having prior equitable rights. Champlin v. Laytin, 18 Wend. (N. Y.) 407.

[26] Weiser v. Dennison, 10 N. Y. 68; Pepper v. George, 51 Ala. 190; Houseman v. Girard Assoc., 81 Pa. St. 256; Wheeler v. McGuire, 86

engaged;[27] and generally a principal will not be affected by knowledge communicated to his agent when it does not relate to matters which are connected with the business of the agent, or which are not within the scope of his employment.[28] Nor does the rule apply where the agent acts for himself in his own interest, and adversely to that of the principal.[29]

It was formerly the rule in England that notice to an agent, in order to bind his principal by constructive notice, must be in the same transaction; but in later cases this rule has been very much modified, and Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States,[30] states the doctrine in England as that if the agent at the time of effecting a purchase has knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it and has it present in his mind will depend upon facts and other circumstances. And the learned justice concurs in the rule as, in his judgment, the true one—fairly deducible from the best consideration of the reasons on which it is founded. In some other American cases the doctrine that the knowledge of an agent should come to him in the identical transaction has been to some extent modified, and it has been held that it is not necessary in all cases that the notice should be thus

Ala. 398; Pringle v. Dunn, 37 Wis. 449; Day v. Wamsley, 33 Ind. 145; Kauffman v. Robey, 60 Tex. 308.

[27] McCormick v. Wheeler, 36 Ill. 114; Blumenthal v. Brainerd, 38 Vt. 402; Roach v. Karr, 18 Kan. 529; Russell v. Sweezey, 22 Mich. 235; Smith v. Dunton, 42 Iowa 48.

[28] Roach v. Karr, 18 Kan. 529; Morrison v. Bausemer, 32 Gratt. (Va.) 225.

[29] His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: (1) That he will very likely act in such a case for himself, rather than for his principal; and (2) he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances; and such is the established rule of law on this subject. Frenkel v. Hudson, 82 Ala. 158; Wickersham v. Zinc Co., 18 Kan. 481.

[30] The Distilled Spirits, 11 Wall. (U. S.) 356.

given;[31] but from all the cases it seems that the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received, or the knowledge obtained, in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he obtained in another transaction at another time and for another principal, was present to his mind at the very time of the transaction in question.[32] Where this fact is satisfactorily established it will bind the principal as fully as if the knowledge in question had been originally acquired by him.[33]

The general rule that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to the principal applies as well to corporations as to natural persons.[34]

§ 226. **Agent dealing for his own benefit.** An agent undertaking any business for another is disabled in equity from dealing in the matter of the agency upon his own account or for his own benefit; and if he does so in his own name he will be considered as holding in trust for his principal.[35] No rule obtains a wider recognition or more strict enforcement; for equity requires and will exact the utmost fidelity and loyalty to their principals from fiduciaries of every sort, and will strip them of every advantage obtained by a breach of trust and confidence.[36]

In accordance with the foregoing rule it has been held that an agent cannot become the purchaser of property confided to his care,[37] and that a purchase made under such circumstances

[31] Cragie v. Hadley, 99 N. Y. 131.

[32] Constant v. University, 111 N. Y. 604; Yerger v. Barz, 56 Iowa 77.

[33] Savings Bank v. Hollenbeck, 29 Minn. 322; Chouteau v. Allen, 70 Mo. 290; Hart v. Bank, 33 Vt. 252; Yerger v. Barz, 56 Iowa 77; Patten v. Ins. Co., 40 N. H. 375.

[34] Reid v. Bank of Mobile, 70 Ala. 199.

[35] Krutz v. Fisher, 8 Kan. 90; Gillenwater v. Miller, 49 Miss. 150; Firestone v. Firestone, 49 Ala. 128; Wilber v. Hough, 49 Cal. 290; Bain v. Brown, 56 N. Y. 285.

[36] Gillenwater v. Miller, 49 Miss. 150; Barziza v. Story, 39 Tex. 354; Dood v. Wakeman, 26 N. J. Eq. 484; Rogers v. Locket, 28 Ark. 290; Conkey v. Bond, 36 N. Y. 403.

[37] Rogers v. Locket, 28 Ark. 290; Prevost v. Gratz, 6 Wheat. (U. S.) 481; Case v. Carroll, 35 N. Y. 389; Harrison v. McHenry, 9 Ga. 164;

carries fraud upon its face.[38] But this, perhaps, is carrying the application of the rule to extreme lengths; for the true spirit and meaning of the rule is that the agent shall not so act toward the subject of the agency for his own benefit as to work injury to his principal.[39] He will not, therefore, be allowed to purchase where he has a duty to perform which is inconsistent with the character of purchaser,[40] nor to speculate for his private gain with the subject-matter committed to his care.[41] This may be regarded as the true extent of the

Robertson v. Ins. Co., 19 La. Ann. 227; Tilleny v. Wolverton, 46 Minn. 256.

[38] Rogers v. Locket, 28 Ark. 290; Cook v. Berlin Mill Co., 43 Wis. 433.

[39] Dood v. Wakeman, 26 N. J. Eq. 484; Sheldon v. Rice, 30 Mich. 296; Goodwin v. Goodwin, 48 Ind. 584.

[40] Grumley v. Webb, 44 Mo. 444; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Boerum v. Schenck, 41 N. Y. 182.

[41] Grumley v. Webb, 44 Mo. 444; Roberts v. Roberts, 65 N. C. 27; McGowan v. McGowan, 48 Miss. 553. It has been held in Illinois that the doctrine that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal, which is within the scope of his agency, applies to the wife of an agent who purchases the property with her separate estate. The court says: "Such a sale, at common law, would clearly have been voidable, both because the wife there had no independent power to contract and because the husband would have taken an estate during coverture in the property. See 1 Shars. Bl. Comm. 441, 442; Reeves, Dom. Rel. (2d ed.) 98, 99, and also id. 28. Notwithstanding that our statute has so far changed the common law that the wife can now contract with the husband, and has abolished his estate during coverture, it has not denied to each all interest in the property of the other. The husband is still the head of the family; and the expenses of the family and of the education of the children are, by section 15 of the statute in relation to husband and wife, "charged upon the property of both husband and wife, or of either of them, in favor of creditors." Rev. St. 1874, p. 577. Upon the death of the wife, intestate, without children surviving, the husband inherits one-half of her real estate (id. ch. 39, § 1); and, in any event, upon her death, he is entitled to dower in her real estate. Hence, the husband still has a pecuniary interest, greater or less, as circumstances may vary, in all the real estate of which his wife may be owner during coverture. There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of

rule; and an agent placing himself beyond it may lawfully contract with his principal with relation to the property. Yet a confidential relation, like principal and agent, gives cause for suspicion; and the circumstances under which a deed is made should be closely scanned, and if a reasonable suspicion exists that confidence has been abused where reposed it will be set aside.[42] In order, therefore, to sustain a purchase by an agent from his principal of property which formed the subject of the agency and to secure the sanction of a court of equity for it, the agent must be able to show it to be fair and honest, and to have been preceded by the disclosure of what he had ascertained or discovered concerning its value; and in every case where the nature of the agency has given the agent control in the management of the property and peculiar opportunities for knowing its condition and value, a purchase of it by the agent will be avoided at the suit of the principal, unless the agent make it affirmatively appear that the transaction was fair, and that he imparted all his information to the principal and acted with the most perfect good faith.[43]

But while the agent may, under some circumstances, become the purchaser of the property from the principal, under no circumstances can he derive any advantage from any other source. Whatever may be gained by him, whether as the fruit of performance or of violation of duty, belongs to his prin-

his great integrity, be just in such a transaction, but unless his marital relations be perverted he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife. In our opinion the policy of the law equally prohibits the wife of the agent, as it does the agent himself, from taking title to the property which is the subject of his agency without the knowledge and express consent of the principal." Tyler v. Sanborn, 136 Ill. 128. To the same effect, Reed v. Anbrey, 91 Ga. 435; Green v. Hugo, 81 Tex. 452; the same doctrine, somewhat modified, is held in other cases; see Winter v. McMillan, 87 Cal. 256; McNutt v. Dix, 83 Mich. 328, where it is held that an agent may not sell to his wife for a less sum than the property will bring in the market. And see Scott v. Gorton, 14 La. 111.

[42] Uhlrich v. Muhlke, 61 Ill. 499.

[43] Cook v. Berlin Mill Co., 43 Wis. 433; Brown v. Post, 1 Hun (N. Y.) 304.

cipal.[44] Hence he cannot, after discovering a defect in the title of the land of his principal in the course of his agency in relation thereto, misuse his discovery to acquire a title for himself;[45] nor can he acquire a tax title, as against his principal, to the lands of the agency.[46] So, too, an agent authorized by his principal to sell the latter's land for a specified net sum, and to receive for his services all above that sum for which he might sell, is bound to disclose to his principal a fact in the condition of the land increasing its value, which he afterwards learns, and of which his principal was ignorant when he fixed the price; and a sale by him on the basis of the sum fixed without giving such information is a fraud.[47]

The rule forbidding conflict between interest and duty is no respecter of persons. It imputes constructive fraud, because the temptation to actual fraud and the facility for concealing it are so great; and it imputes it to all alike who come within its scope, however much or however little open to suspicion of actual fraud.[48]

The spirit no less than the letter of the rule not only prohibits direct conveyances, but with stronger reason declares void a purchase in an indirect or circuitous manner. Hence, if one employed as an agent to sell property arranges with the purchaser for an interest in the purchase, the sale will be set aside at the instance of the principal.[49]

The spirit of the rule which prohibits the agent from dealing with the subject of the agency to his own advantage extends the application of the principle to those whom he may employ as instrumentalities in effecting the purposes of his business. Hence a clerk or other person, who, by his connection with an agent, or by being employed or concerned in his affairs, has acquired a knowledge of the property, labors under the same incapacity as the agent.[50] Thus, the purchase of

[44] Dood v. Wakeman, 26 N. J. Eq. 484.

[45] Rogers v. Locket, 28 Ark. 290.

[46] Krutz v. Fisher, 8 Kan. 90. Unless he first distinctly notify the principal that he renounces the agency. McMahon v. McGraw, 26 Wis. 614.

[47] Hegenmyer v. Marks, 37 Minn. 6.

[48] Cook v. Berlin Mill Co., 43 Wis. 433.

[49] Miller v. R. R. Co., 83 Ala. 274; Kramer v. Winslow, 130 Pa. St. 484; and see Hegenmyer v. Marks, 37 Minn. 6.

[50] Coffee v. Ruffin, 4 Cold. (Tenn.) 510; Wade v. Harper, 3 Yerg. (Tenn.) 383; Oliver v. Piatt, 3 How. (U. S.) 333.

land by the clerk of a broker employed to make a sale of such land will render the clerk a trustee for the vendor.[51]

§ 227. **Continued—Effect of laches of vendor.** There is no question as to the absolute integrity of the proposition that no person occupying a relation of confidence to another can be permitted to purchase the property which forms the subject of the confidence when he has, by reason of such relation, a duty to perform in respect to it which is inconsistent with the character of a purchaser. But such a sale is not void. At best it merely raises an imputation of fraudulent conduct on the part of the agent and the vendor, or those united with him in interest, would be entitled to have the sale set aside without showing any actual fraud or injury.

But to avoid a sale of this kind application must be made within a reasonable time, and unexplained delay, coupled with other incidents, may bar the assertion of the right. Thus, if the vendor permits the holder of the legal title to expend large sums of money in improvements, or to do any other acts which tend to enhance the value of the land, which he would not have done had the right to rescind been promptly asserted, this would constitute a laches sufficient to preclude the negligent party from relief. Equity will not permit a person entitled to its aid to experiment or speculate at the risk or expense of another, nor wait until the future shall determine whether property will increase or decrease in value, and then elect to take it if it increases.[52] The rule is more frequently applied to sales by infants, trustees, or ministerial officers, but its principles extend equally to the case of agents, and while the cardinal rule still holds good that the agent cannot become a purchaser, it is qualified by the further rule that if he does his title is not void, but voidable only, and that the right of avoidance may be lost by acquiescence or laches.

§ 228. **The right to commissions.** It requires no citation of authority to sustain the principle that where a sale has been made and consummated through the instrumentality of a broker or agent, he is entitled to whatever commission may

[51] Gardner v. Ogden, 22 N. Y. 349; Beeson v. Beeson, 9 Pa. 284; Rosenberger's Appeal, 26 Pa. 67.

[52] Gibson v. Herriott, 55 Ark. 85; Bank v. R. R. Co., 125 Mass. 490; Cox v. Montgomery, 36 Ill. 398; Bliss v. Prichard, 67 Mo. 181.

have been stipulated for, or, in the absence of an express contract, to a reasonable compensation for his services. It is not essential, however, to fix the right to commissions that a sale should in all cases result from the agent's efforts—the obligation of his undertaking is simply to bring the buyer and seller to an agreement;[53] and this he fully accomplishes when he has produced a person ready, willing and able, to purchase the property on the prescribed terms.[54] Having thus acquitted himself of the only duty which the law imposes his commissions are regarded as earned; and the principal cannot relieve himself from liability therefor by a capricious refusal to consummate the sale,[55] or by a voluntary act of his own disabling him from performance.[56] So, also, if after the agent has produced an acceptable purchaser, and the contract has been signed, the latter refuses to complete the agreement on account of fraud or misrepresentation on the part of the owner[57] or for defects in the title,[58] the right to compensation

[53] Sibbald v. Bethlehem Iron Co., 83 N. Y. 378; Knapp v. Wallace, 41 N. Y. 477; Hinds v. Henry, 36 N. J. L. 328.

[54] Wylie v. Marine Bank, 61 N. Y. 415; Tombs v. Alexander, 101 Mass. 255; Phelan v. Gardner, 43 Cal. 306; Bell v. Kaiser, 50 Mo. 150; Edwards v. Goldsmith, 16 Pa. St. 43; Jones v. Adler, 34 Md. 440; Hamlin v. Schulte, 34 Minn. 534; Vinton v. Baldwin, 88 Ind. 104; De Laplaine v. Turnley, 44 Wis. 31; Hoyt v. Shipherd, 70 Ill. 309; Leete v. Norton, 43 Conn. 219; Buckingham v. Harris, 10 Colo. 455; Wilson v. Mason, 158 Ill. 304; Gelatt v. Ridge, 117 Mo. 553; Coleman v. Meade, 13 Bush (Ky.) 358; Kimberly v. Henderson, 29 Md. 512; Hinds v. Henry, 36 N. J. L. 328.

[55] De Laplaine v. Turnley, 44 Wis. 31; Stewart v. Murray, 92 Ind. 543; Moses v. Burling, 31 N. Y. 462; Phelan v. Gardner, 43 Cal. 306; Tyler v. Pars, 52 Mo. 249; Greenwood v. Burton, 27 Neb. 808; O'Brien v. Gilleland, 79 Tex. 602.

[56] Reed's Executors v. Reed, 82 Pa. St. 420; Lane v. Albright, 49 Ind. 275; Nesbit v. Helser, 49 Mo. 383; Campbell v. Thomas, 87 Cal. 428; Hannon v. Moran, 71 Mich. 261; Ward v. Cobb, 148 Mass. 518; Francis v. Baker, 45 Minn. 83.

[57] Glentworth v. Luther, 21 Barb. (N. Y.) 145.

[58] Knapp v. Wallace, 41 N. Y. 477; Love v. Miller, 53 Ind. 294; Pearson v. Mason, 120 Mass. 53; Leete v. Norton, 43 Conn. 295; Sayre v. Wilson, 86 Ala. 151; Parker v. Walker, 86 Tenn. 566. It has been held, however, that where a purchaser refuses to complete a sale of real estate on a flimsy objection to the title, and the broker has failed to reduce the contract to writing so that no action for a specific performance will lie, the broker is not entitled to his commissions from the owner. Gilchrist v. Clarke (Tenn.), 8 S. W. Rep. 572.

will still remain unimpaired,[59] provided the agent himself is without fault.[60] Again, after negotiations begun through a broker's intervention have virtually culminated in a sale, he cannot be discharged so as to deprive him of his commissions; and if it be satisfactorily shown that the broker was the procuring cause of the sale he will be awarded compensation notwithstanding such discharge.[61] The provisions of the contract of agency may vary these rules, as, if the contract provides in terms that a commission shall be paid only on the consummation of a sale, and the principal, on reasonable grounds, declines to complete same, the right to compensation may not accrue.[62]

§ 229. **Continued—Agent must produce actual purchaser.** It has been held that before an agent or broker can recover his commissions, where the sale has not been consummated, it must appear that the proposed purchaser was of sufficient pecuniary ability to have consummated the purchase; that it is not enough that the person procured by the agent either offered or actually entered into a contract of purchase, if he was not able to comply with his contract,[63] particularly if the vendor in accepting him as such a purchaser did not rely upon his own judgment but rather upon that of the agent. Indeed the production by the agent of a person as purchaser has been held to be an implied representation on his part, that such person is financially able, as well as ready and willing to complete the purchase.[64] Of the justness of this rule there can be no question and it has received a general acquiescence whenever invoked.[65] There is, however, a marked difference

[59] Cook v. Fiske, 12 Gray (Mass.) 491; Desmond v. Stebbins, 140 Mass. 339; Duclos v. Cunningham, 102 N. Y. 678; Edwards v. Goldsmith, 16 Pa. St. 43.

[60] As where the broker knew the title was defective. Tombs v. Alexander, 101 Mass. 255; Barthell v. Peter, 88 Wis. 316.

[61] Attrill v. Patterson, 58 Md. 226; Keys v. Johnson, 68 Pa. St. 42; Vreeland v. Vetterlein, 33 N. J. L. 247; Goss v. Steavens, 32 Minn. 472; Phelan v. Gardner, 43 Cal. 306; Bell v. Kaiser, 50 Mo. 150; Lyon v. Mitchell, 36 N. Y. 235.

[62] Flower v. Davidson, 44 Minn. 46; but see Smith v. Schiele, 93 Cal. 144.

[63] Coleman v. Meade, 13 Bush. (Ky.) 358; Kimberly v. Henderson, 29 Md. 512; Hinds v. Henry, 36 N. J. L. 328.

[64] Butler v. Baker, 17 R. I. 582.

[65] Duclos v. Cunningham, 102 N. Y. 678; Kimberly v. Henderson, 29 Md. 512.

of opinion as to who shall sustain the burden of proof in showing the financial ability of the proposed purchaser. One line of cases holds that the burden is on the agent or broker suing for his commissions, upon the ground that it is a part of his undertaking to produce a person able to respond to the financial demands of the contract.[66] On the other hand there are cases which hold with equal directness that it is to be presumed, until the contrary appears, that the person produced is solvent and pecuniarily able to make the purchase, and hence, that the burden of showing inability rests on the defendant.[67] Under this line of decisions the plaintiff makes a *prima facie* case when he proves the introduction by him to the vendor of a person willing to purchase on the terms at which the agent was authorized to sell. It would seem as though the former rule is founded on the better reason and is more in consonance with the principles of natural justice, while the latter is, to a large extent, technical and arbitrary.

§ 230. **Continued—Sale must result from broker's efforts.** In all cases where a sale has been effected, however, in order to fix the broker's rights, it must have been the direct result of his exertions. This seems to be the indispensable condition to a right of recovery on his part; but, in regard to the extent or character of such exertions, there is no fixed standard or rule of measurement. Indeed, it would seem that any effort, however slight, which actually operated to induce the vendee to purchase would be sufficient to entitle the broker to remuneration.[68] On the other hand, if the services of the broker,

[66] Iselin v. Griffith, 62 Iowa 668; Zeidler v. Walker, 41 Mo. App. 118; Butler v. Baker, 17 R. I. 582; Leahy v. Hair, 33 Ill. App. 461.

[67] Cook v. Kroemeke, 4 Daly (N. Y.) 268; Grosse v. Cooley, 43 Minn. 188.

[68] Pope v. Beals, 108 Mass. 561; Jones v. Adler, 34 Md. 440; Bell v. Kaiser, 50 Mo. 150; Lloyd v. Matthews, 51 N. Y. 124. Thus, if a real estate broker communicate information regarding property in his hands to one who reports it to a friend, who subsequently purchases it from the owner directly, the broker must be regarded as the procuring cause of the sale, and therefore entitled to his commission, even though he may have had no personal intercourse or dealing with the purchaser. Lincoln v. McClatchie, 36 Conn. 136; and see Sussdorff v. Schmidt, 55 N. Y. 320; Carter v. Webster, 79 Ill. 435; Earp v. Cummins, 54 Pa. St. 394—all of which sustain the doctrine of the text. Whenever the broker is the "procuring cause" the right to commissions becomes fixed—as

however arduous, have failed in the accomplishment of a sale in the first instance, and as a result the negotiations have been definitely abandoned, notwithstanding other and supervening influences may have eventually induced the vendee to reconsider his resolution and make the purchase, the broker will not be able to claim commissions.[69] This, however, must be taken with one important and necessary limitation; if the efforts of the broker are rendered a failure by the fault of the employer then he may still claim commissions, upon the familiar principle that no one can avail himself of the non-performance of a condition precedent who has himself occasioned its non-performance. But this limitation is not even an exception to the general rule affecting the broker's right; for it goes on the ground that the broker has done his duty, and that he has brought buyer and seller to an agreement; but that

where a broker advertised property at his own expense and a third person seeing it directed a purchaser to the owner. Anderson v. Cox, 16 Neb. 10; but see Charlton v. Wood, 11 Heisk. (Tenn.) 19. So, also, where a purchaser attracted to the property by the broker's signs, advertisements, etc., opens negotiations with the owner direct. Sussdorff v. Schmidt, 55 N. Y. 319. If the broker simply introduces a purchaser and through such introduction the owner personally effects a sale afterward the right to commissions will, it seems, accrue to the broker. Scott v. Patterson, 53 Ark. 49. It must be understood, however, that in all such cases the broker must be under due employment by the owner. Hanford v. Shapter, 4 Daly (N. Y.) 243.

[69] Earp v. Cummins, 54 Pa. St. 394; Lipe v. Ludewick, 14 Ill. App. 372; Livezey v. Miller, 61 Md. 226; Wylie v. Marine Bank, 61 N. Y. 415. As remarked by the court in Sibbald v. Iron Co., 83 N. Y. 378: "The risk of failure is wholly his. The reward comes only with success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success; and in such event it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases this must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest—but all that gives him no claim. It was

the contract is not consummated and fails through the afterfault of the seller.[70]

Nor is it necessary, to entitle the broker to his commissions, that the contract negotiated by him should be enforceable in law, provided the purchaser remains willing to comply with same and such compliance is prevented by the refusal of the owner to receive the purchase price and make conveyance. If, in fact, the broker was authorized to negotiate the sale the further fact that the purchaser could not have been compelled to carry out the contract had he chosen to set up the statute of frauds, is immaterial, if, through the owner's fault, the sale was not consummated.[71]

As a further requisite to enable a broker to recover commissions he must have been expressly employed or authorized by his principal to conduct the necessary negotiations, or such must be inferred as an implication of law from the fact that the principal subsequently avails himself of the broker's services.[72] If the vendor refuses to employ the broker, the mere fact that he sends a customer who eventually buys will not entitle him to compensation.[73]

If by a special contract the broker is not to receive any compensation unless the property is sold at a stated price, he is not entitled to commissions unless the property is sold at that price, or unless he produces a purchaser who is willing to pay it.[74] So, too, an agent must act within the terms of his authority and a substantial variance therefrom will defeat his right to compensation,[75] but the mere fact that the broker has agreed with a purchaser to sell land on different terms from

part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors."

[70] Sibbald v. Iron Co., 83 N. Y. 378.

[71] Holden v. Starks, 159 Mass. 503; Gelatt v. Ridge, 117 Mo. 553; Kalley v. Baker, 132 N. Y. 1.

[72] Atwater v. Lockwood, 39 Conn. 45; Hinds v. Henry, 36 N. J. L. 328; Twelfth Co. v. Jackson, 102 Pa. St. 296; Canby v. Frick, 8 Md. 163; Redfield v. Tegg, 38 N. Y. 212. Leaving a description of property with a real estate broker, accompanied by a request to sell at certain terms and for a certain price, is a sufficient contract of employment. Long v. Herr, 10 Colo. 380.

[73] Atwater v. Lockwood, 39 Conn. 45.

[74] Schwartze v. Yearly, 31 Md. 270; Briggs v. Rowe, 1 Abb. (N.Y.) App. Dec. 189.

[75] Nesbit v. Helser, 49 Mo. 383.

those contained in his instructions will not affect his rights if the principal subsequently ratifies the agreement; for such ratification will be held equivalent to prior authority, and the principal will be bound for the amount of commissions agreed upon.[76] And, in like manner, where the terms of the sale are fixed by the vendor in accordance with which the broker undertakes to produce a purchaser, yet if, upon the procurement of the broker, a purchaser comes with whom the vendor negotiates, and thereupon voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, then, in either case the broker will be entitled to his commission at the rate specified in his agreement with his principal.[77]

§ 231. Continued—Where more than one broker is employed. Where several brokers are avowedly employed, the entire duty of the vendor is performed by remaining neutral between them, and he will have the right to make the sale to a buyer produced by any of them without being called upon to decide between the several agents as to which of them was the primary cause of the purchase.[78] So, also, if a broker who first procures a purchaser reports his offers to his principal without identifying the person from whom they came, he cannot recover commissions, in case of a subsequent sale through another broker at the same price to the same purchaser, unless it appears in evidence that the vendor knew this fact, or that notice was given him by the agent before the completion of the contract and payment of commissions to the second broker. If there be but one broker employed he can with safety withhold the name of the purchaser until the sale shall have been made; but as the employment of one broker does not preclude the employment of another to procure a purchaser for the same property, it becomes the duty of the broker who pro-

[76] Woods v. Stephens, 46 Mo. 556; Gelatt v. Ridge, 117 Mo. 553.

[77] Stewart v. Mather, 32 Wis. 344; Woods v. Stephens, 46 Mo. 555; see also Fisher v. Ball, 91 Ind. 243; Lockwood v. Rose, 125 Ind. 588; Sibbald v. Iron Co., 83 N. Y. 378; Reynolds v. Tompkins, 23 W. Va. 229.

[78] Vreeland v. Vetterlein, 33 N. J. L. 247. But where the owner employs several brokers, he is bound to pay the one who does in fact effect the sale, and cannot exercise

cures one, and who looks to the security of his commissions, to report the name and offer to his principal that the latter may be notified in time, and thus put upon his guard before he pays the commissions to either.[79] The foregoing principles are in full accordance with good business methods, and are such as are generally accepted in real estate transactions.

A more difficult question is presented where several brokers have each endeavored to bring about a sale, which is finally consummated, and each has contributed something toward the result. The general rule is that where two or more brokers are employed there is no implied contract to pay more than one commission, and the question then arises as to which one of several claimants shall be entitled to receive same. Reasoning by principle, as well as by analogy to other branches of the law, it would seem that where there are a number of different causes which assist in producing a specific result, and where such result would not have occurred if either one of the different causes had been wanting, then such result must be referred to the "predominating efficient cause," as one writer concisely puts it,[80] and applying this doctrine to the question under consideration the broker whose efforts were the real efficient or effective means of concluding the sale must be preferred.[81]

Another phase of the subject is presented where several brokers are each acting independently with respect to the subject-matter and in several instances a somewhat different rule from that above given has been announced. Thus, upon the principle that until the authority given to a broker has been revoked and notice of such fact communicated to him, his agency continues, it has been held that, where more than one broker has been employed, each will have a right to find a purchaser and earn a commission.[82] There would be no injustice in this, however, if knowledge of the employment of the

his option. Eggleston v. Austin, 27 Kan. 245; Whitcomb v. Bacon, 170 Mass. 479.

[79] Tinges v. Moale, 25 Md. 480; and see Dowling v. Morrill, 165 Mass. 491.

[80] Phil. Ins. § 1132.

[81] Whitcomb v. Bacon, 170 Mass. 479; see also M. C. R. R. Co. v. Burrows, 33 Mich. 6; Behling v. Pipe Lines, 160 Pa. St. 359.

[82] See Bash v. Hill, 62 Ill. 216. In Fox v. Rouse, 47 Mich. 558, the plaintiff had been employed by defendant to effect a sale. He found a purchaser who was ready and willing and able to take the land upon the terms prescribed. It de-

different agents were kept from them; or if, when the property has been sold, the unsuccessful broker is not notified of that fact, for where a party engages the services of another to assist him in making a trade of property, if he desires to dispense with such services he should give the other party notice; if he does not, and the service is rendered, he will be required to pay for the same.[83]

§ 232. **Continued—Sale by owner without broker's interference.** A person who has employed a broker to sell his lands may, notwithstanding, negotiate a sale himself; and if he does so without any agency or participation of the broker, he will not be liable to him for commissions.[84] The same rule obtains even where the broker has introduced a person with whom he has been negotiating, where such negotiations have afterward been abandoned, and the principal without assistance from the broker subsequently completes the transaction.[85] But, as a rule, where a broker introduces a purchaser, and as a result of such introduction a sale is effected, the broker will be entitled to commissions notwithstanding that the owner negotiates the sale himself. The broker, in such case, must be regarded as the "procuring cause." So, too, where a broker who is employed to sell property at a given price and for an agreed commission has opened a negotiation with a purchaser, and the principal, without terminating the agency or the negotiation so commenced, takes it into his own hands and concludes a sale for a less sum than the price fixed, the broker is entitled at least to a ratable portion of the agreed commission.[86] The mere fact, however, that a broker intervened between the parties to a negotiation which was originally commenced and finally consummated without his

veloped that the land had been sold by another agent similarly employed by the plaintiff. *Held*, that the plaintiff could recover.

[83] Bash v. Hill, 62 Ill. 216.

[84] Dolan v. Scanlan, 57 Cal. 261; Dubois v. Dubois, 54 Iowa 216; Stewart v. Murray, 92 Ind. 543; McClave v. Paine, 49 N. Y. 561; Tombs v. Alexander, 101 Mass. 255; Keys v. Johnson, 68 Pa. St. 42; Armstrong v. Wann, 29 Minn. 126; Hungerford v. Hicks, 39 Conn. 259.

[85] Wylie v. Marine Bank, 61 N. Y. 415; Weinhouse v. Cronin, 68 Conn. 250.

[86] Martin v. Silliman, 53 N. Y. 615; Stewart v. Mather, 32 Wis. 344; Woods v. Stephens, 46 Mo. 555; compare Childs v. Ptomey, 17 Mont. 502.

agency, and by his conversation with third persons or otherwise contributed to its consummation, does not entitle him to commissions when a sale at the price fixed as the condition of his employment was not effected, and he was not prevented by his employer from effecting a sale at that price.[87]

It has been held, where the owner of land agreed with a broker that he would pay him a certain amount if he would find a purchaser within a specified time who would pay a certain price for the estate, that if within such time the broker procured such purchaser, he was entitled to recover his commission, though the owner sold the property before the broker found a purchaser.[88]

As a general rule, where land is sold through the instrumentality of a broker employed by the owner, he is entitled to his commission, although the owner himself negotiates the sale, and even though the purchaser is not introduced to the owner by the broker, and the latter is not personally acquainted with the purchaser;[89] and in every case where a broker who has been employed to sell introduces a purchaser to the owner, and through such introduction negotiations are begun and a sale of the property is finally effected, the broker is entitled to commissions, although in point of fact the sale may have been made by the owner.[90] It would seem, however, that the mere fact of directing the purchaser's attention to the land is not sufficient to entitle the broker to commissions when he fails to disclose the owner's name and the purchaser afterwards learns, through other sources, who the owner is and purchases directly from him, the owner having no knowledge of the broker's connection with the case.[91] This seems reasonable and in consonance with natural justice, yet the

[87] Briggs v. Rowe, 1 Abb. App. Dec. (N. Y.) 189.

[88] Lane v. Albright, 49 Ind. 275. In this case the owner was held to be liable for commissions because he had deprived the broker of the power to earn them, and that in order to claim commissions the broker was not required to produce a purchaser within the specified time, as the owner had put it beyond his power to complete the contract. And see Vinton v. Baldwin, 95 Ind. 433.

[89] Sussdorff v. Schmidt, 55 N. Y. 319.

[90] Jones v. Adler, 34 Md. 440; Woods v. Stephens, 46 Mo. 555; Hafner v. Herron, 165 Ill. 242; Bash v. Hill, 62 Ill. 216; Lloyd v. Matthews, 51 N. Y. 124; Lyon v. Mitchell, 36 N. Y. 235.

[91] Anderson v. Smythe, Colo. Dec. 91.

question of "procuring cause" is not altogether well settled and there are cases which seem to militate against this position.[92]

233. Continued—Failure to close within time stipulated. It would seem that if an agent for the sale of land is limited as to the time within which to earn his commissions the sale must be effected within such limited time, and that he cannot recover otherwise,[93] although one whom he introduced to the owner afterwards becomes the purchaser of the land;[94] yet where the agent, within the period fixed by the contract, has so negotiated a sale in such a manner that success is practically certain and immediate a different rule might, and probably would, apply.[95]

Where the broker is allowed a "reasonable time" the circumstances must furnish the grounds for determination;[96] and where no time is stipulated for the continuance of the contract either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith.[97] In such event, if negotiations are then pending it seems commissions may be recovered if the sale is afterwards consummated.[98] Where the broker has been allowed a reasonable time to procure a purchaser and effect a sale and has failed to do so, and the principal in good faith has terminated the agency and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and

[92] See § 230 *ante*.

[93] Wright v. Beach, 82 Mich. 469.

[94] Fultz v. Wimer, 34 Kan. 576; Beauchamp v. Higgins, 20 Mo. App. 514. But see Williams v. Leslie, 111 Ind. 70, where an agency to sell a tract of land was limited to nine months, but the contract provided that if a customer should be introduced by the agent during the time to whom the principal should sell afterward the agent should be entitled to his commission. *Held* that, by the terms of the contract, the agent was entitled to compensation, whether the sale to the customer introduced by him was consummated within nine months or not.

[95] Blumenthal v. Goodall, 89 Cal. 251; and see Williams v. Leslie, 111 Ind. 70.

[96] Thus, a contract to sell in a "short time" was held to be fulfilled by procuring a customer within two weeks. Smith v. Fairchild, 7 Colo. 510. Twenty-two days was held to fill the requirement that a sale should be made within a "reasonable time." Lane v. Albright, 49 Ind. 275.

[97] Sibbald v. Iron Co., 83 N. Y. 378.

[98] Knox v. Parker, 2 Wash. 34.

that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions.[99] Neither can commissions be claimed when a customer is presented after the principal has withdrawn his offer to sell.[1]

§ 234. **Continued—Revocation of broker's authority.** As a general rule an owner may always recall the authority he may have given to a broker, and this notwithstanding the broker may have expended time, labor and money in endeavoring to effect a sale. The mere authorization to offer lands for sale, even though accompanied by an express promise to pay a stipulated compensation in case a sale is effected, does not, in any proper sense, constitute a contract. It purports to be nothing more than an unilateral agreement, is made without consideration, and lacks the important element of mutuality of obligation. At best, it is nothing more than a present, but revocable, grant of authority to sell, and the mere giving and receiving of such a grant creates no contractual relation between the parties. So long as the power remains unexecuted by the broker it may, at his pleasure, be recalled by the owner, and the broker will be without remedy.[2]

§ 235. **Continued—Sale by unlicensed broker.** The right of every person to pursue any lawful business, occupation or profession, is subject to the paramount right inherent in every government, as a part of its police power, to impose such restrictions and regulations as the protection of the public may require.[3] This power is most frequently invoked to regulate the practice of those professions where special skill and knowledge are required and which directly affect the health, property or morals of the people. The primary object of these laws is to protect the public and to regulate the practice of particular professions and while a fee is usually exacted for a certificate to the licentiate the matter of revenue is only incidental. There has never been any serious dispute as to the absolute right of the state to impose such restrictions and regulations as may be found necessary for the protection of the health, morals, and safety of society and to prohibit the

[99] Sibbald v. Iron Co., 83 N. Y. 378.

[1] Young v. Tranor, 158 Ill. 428.

[2] See Stensgaard v. Smith, 43 Minn. 11, for an interesting illustration of the doctrine of the text.

[3] State v. Noyes, 47 Me. 189; State v. Randolph, 23 Ore. 74.

exercise of the right to practice by those who neglect to comply with the regulations.

But there are many occupations which may be pursued by any person without detriment or danger to the public welfare and therefore need no regulations to control them, and in this category we may easily place a real estate agent or broker. Such business may properly be carried on by any person. It has been held, however, that the legislature, in authorizing the imposition of license fees is not restricted to any particular class of trades or occupations,[4] and it is fundamental that where a statute makes a particular business or occupation unlawful for unlicensed persons a contract made in the course of such business is unenforceable and without legal effect.[5] The occupation of brokerage has ever been held to be the subject of regulation under the police power of the state, and license fees imposed upon this class of traders are regarded as a proper exercise of the power.[6]

In many of the decisions, where the question as to the right of an unlicensed broker to recover commissions on sales made through his instrumentality has arisen, the special law under consideration has been the internal revenue acts of the United States; but the principles involved in such cases are, in a large measure, inapplicable to state laws and local municipal regulations. The fact that an agent had taken out no license under a former internal revenue law of the United States was held not to affect his right to recover compensation. The sole object of that law was to raise revenue; and the question in such cases is whether the statute was intended as a protection or merely as a fiscal expedient—whether the legislature intended to prohibit the act unless done by a qualified person or merely that the person who did it should pay a license fee. If the latter the act is not illegal,[7] and the revenue laws will not affect his right to recover upon an express contract for fixed compensation.[8] On the other hand, if the statute or ordinance is intended to regulate the business of brokerage, a contrary rule would apply; and unless the broker, in the event of

[4] Braun v. Chicago, 110 Ill. 186.

[5] Eckert v. Collot, 46 Ill. App. 361; Buckley v. Humason, 50 Minn. 195.

[6] Braun v. Chicago, 110 Ill. 186; Johnson v. Hulings, 103 Pa. St. 498.

[7] Ruckman v. Bergholz, 37 N. J. L. 437.

[8] Woodward v. Stearns, 10 Abb.

such a regulation, has complied with the law and been duly licensed to pursue such a calling he cannot recover commissions by a legal action.[9] And further, in order to effect a recovery it is necessary that the broker be licensed at the time the commissions are claimed to have been earned. That he is licensed at the time suit is brought is not sufficient.[10]

§ 236. **Continued—Agent as purchaser.** The general subject of purchases by agents has been reviewed in a foregoing paragraph, where it was shown that an agent to whom property has been intrusted for sale cannot himself become the purchaser except under peculiar conditions.[11] The only inquiry pertinent at this time is with respect to the right of an agent to ask and receive commissions where, instead of finding a third party who is willing to or does purchase, he, himself, becomes the purchaser. There would seem to be no good reason, either in law or morals, for a denial to him of this privilege. The agreement of the vendor is to pay commissions when the agent shall have procured a purchaser able and willing to take the property at the price proposed, and usually it is immaterial to the vendor who the purchaser is. And even if the agent is to find a purchaser who will pay for it the best price attainable, if the vendor agrees upon a price at which he is willing to sell, and there is no fraud, concealment or misrepresentation on the part of the agent, he should not be distinguishable, so far as respects the payment of commissions, if instead of presenting a third party he offers himself.

The question does not seem to have been raised to any extent in the reported cases. A diligent search has failed to reveal anything that militates against these views; while it does appear that, so far as they have been presented, they have received the sanction of the courts. Thus, it has been held that a broker who engages for a commission to find a purchaser of land at such price as may be agreed upon between such purchaser and the vendor, and then becomes himself the purchaser, in whole or in part, the vendor accepting him as

Pr. (N. Y.) N. S. 395; Pope v. Beals, 108 Mass. 561.

[9] Johnson v. Hulings, 103 Pa. St. 498; McConnell v. Kitchens, 20 S. C. 430; Buckley v. Humason, 50 Minn. 195.

[10] Eckert v. Collot, 46 Ill. App. 361.

[11] See sec. 226 *ante*.

such, may recover the commission upon clear proof that such was the understanding upon the part of the vendor at the time of the sale.[12]

§ 237. **Sale by agent above stipulated price.** It is no uncommon thing for owners to place property in the hands of brokers with a stipulation that same shall be sold so as to net to the owner a fixed sum, the broker to retain as his compensation whatever amount may be realized above the price named. While this excess is usually called "commissions" it does not come within the usual legal definitions of the term and the relation thus created between the parties more resembles that of vendor and purchaser than that of principal and agent. In matters relating to personalty this is the view now invariably adopted by the courts where the property has passed into the possession or custody of the agent, and while these conditions do not usually exist where the subject-matter is real property, the principle nevertheless applies in a modified form. Where such a stipulation has been entered into it has been held that any sale agreed to be made by the agent must be regarded as having been made by him in the capacity of a vendor, and not on account of the land-owner. Hence, he would have a right to make the sale upon any terms he might deem most advantageous; he might sell either for cash or on time and with such conditions annexed as he might see fit to impose. The land-owner would, of course, be entitled to the immediate payment of the stipulated price, but this would practically be the extent of his rights. And in case the sale, for any reason, should fail, it seems the land-owner could not claim the deposit as a forfeit.[13]

While the general doctrine above set forth has long been recognized in commercial transactions concerning chattels, it does not seem to have come within the purview of courts to any extent with respect to real property, and while the conclusions above stated are believed to be sound and in consonance with the received rules of law as applied to sales gener-

[12] Grant v. Hardy, 33 Wis. 668. And the fact that, in effecting the sale, the broker has acted in fraud of his co-purchaser, will not affect his right to the commission as against the vendor. Ibid.

[13] See Robinson v. Eaton, 93 Cal. 80. This is the leading, and possibly the only, case upon the subject.

ally, the subject may yet be said to be one of doubt, to be definitely ascertained and settled in the future.

§ 238. Double agency. The undertaking as well as the duty of an agent is to promote, by all lawful measures, the interests of his principal. Hence, it becomes the duty of an agent for the vendor to sell the property at the highest attainable price; of the agent for the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent.[14] For this reason it has invariably been held that an agent cannot recover for services rendered while holding such entirely incompatible relations,[15] unless, indeed, it clearly appears that both vendor and vendee had full knowledge of all the circumstances and assented to the double employment.[16] The justness of the rule is apparent, and its soundness has never been questioned; it is a rule of public policy, founded upon the frailties of human nature, and it matters not that no fraud may have been meditated and no injury done, for it is not intended to be remedial of actual wrong, but rather a preventative of the possibility of it.[17]

But while the rule may be considered as established beyond controversy, it has an exception, equally well established, that an agent may be employed by and recover from both parties as a mere "middle-man" to bring them together.[18] When this has been accomplished his duty is performed, and to his

[14] Farnsworth v. Hemmer, 1 Allen (Mass.) 494; Webb v. Paxton, 36 Minn. 532.

[15] Walker v. Osgood, 98 Mass. 348; Stewart v. Mather, 32 Wis. 344; Raisin v. Clark, 41 Md. 158; Bollman v. Loomis, 41 Conn. 581; Everhart v. Searle, 71 Pa. St. 256; Lynch v. Fallon, 11 R. I. 311; Scribner v. Collan, 40 Mich. 375; Lloyd v. Colston, 5 Bush (Ky.) 587; Bell v. McConnell, 37 Ohio St. 396.

[16] Bell v. McConnell, 37 Ohio St. 396; Rice v. Wood, 113 Mass. 133; Barry v. Schmidt, 57 Wis. 172; and see Vinton v. Baldwin, 88 Ind. 104; Rowe v. Stevens, 53 N. Y. 621. A custom among brokers that they are entitled to a commission from each party is invalid as against public policy, and cannot be sustained by the courts. Raisin v. Clark, 41 Md. 158.

[17] Rice v. Davis, 136 Pa. St. 439.

[18] Stewart v. Mather, 32 Wis. 344; Rupp v. Sampson, 16 Gray (Mass.) 398; Rowe v. Stevens, 53 N. Y. 621; Montross v. Eddy, 94 Mich. 100.

case the policy of the law which excludes double compensation has been considered inapplicable. It has been held that this will be the case even where each of the principals was ignorant of his employment by the other.[19]

The rule and the exception are well established both by reason and authority. When an agent is employed by one party to sell and by the other to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict and in respect to adverse interests, and he cannot fairly serve both parties. This adverse interest of the parties, and this conflicting and inconsistent duty of the agent, forms the basis of the rule; and the exception is founded upon the absence of this adverse interest of the parties and upon the concurrence of the duty of the agent toward both parties alike; as where the price is fixed by the vendor, and merely accepted by the purchaser through the procurement of the agent, or where no terms are fixed by the vendor or authorized by him to be fixed by the agent, and the agent acts as the mere middleman to bring the parties together for a negotiation and contract to be made by themselves.[20]

Again, there is nothing inconsistent with the rule as stated, in permitting two persons who desire to negotiate an exchange or a bargain and sale of property to agree to delegate to a third person in whose judgment and discretion they mutually repose confidence the duty of fixing terms or arranging for a price. Such agent may not, indeed, be able to serve each of his principals with all his skill and energy; nor obtain for his vendor principal the highest price which might be obtained, or for the purchaser the lowest price at which the land might be bought; yet he may still be able to render to each a service entirely free from falsehood and fraud, and in which his best judgment and soundest discretion are fully exercised. In such case such service is all that either of his principals contracted for; and when this is done, and free assent given by each principal to the double relation, the right of the agent to compensation cannot be denied on any just principle of morals or of law.[21]

[19] Ranney v. Donovan, 78 Mich. 318.

[20] Orton v. Scofield, 61 Wis. 382; Barry v. Schimdt, 57 Wis. 172; Bell v. McConnell, 37 Ohio St. 396; Rupp v. Sampson, 16 Gray (Mass.) 398; Walker v. Osgood, 98 Mass. 348; Cox v. Haun, 127 Ind. 325.

[21] Bell v. McConnell, 37 Ohio St, 396; and see Alexander v. Univer-

Within the foregoing exceptions a recovery may be had by an agent from either or both of his principals, he having acted with their full knowledge and consent; yet the precept holds equally good in law as in morals that no servant can serve two masters, and any attempt so to do without the full knowledge and free consent of both parties is not to be tolerated. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion; and this duty he cannot divide and give part to another. By engaging with a second he forfeits his right to compensation from the one who first employed him, and for the same reason he cannot recover from the second employer who is ignorant of the first engagement. Nor will the fact that the second employer has knowledge of the first engagement materially alter the case; for then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in violation of his rights. Neither is it any answer to say that the second employer, having knowledge of the first employment, should be held liable on his promise because he could not be defrauded by the transaction; for the contract itself is void as against public policy and good morals, and both parties thereto being *in pari delicto* the law will leave them as it finds them.[22]

§ 239. **The measure of compensation.** Usually where parties stipulate for the services of an agent or broker in the purchase or sale of real estate, the compensation which is to be paid for such service is also fixed by mutual agreement; and, in the absence of any other controlling circumstances, such agreement will form the basis of the amount which the agent shall be entitled to receive. Where no such arrangement has been made, a well-established and uniform custom or usage may be relied upon as a proper criterion for fixing the value;[23] and

sity, 57 Ind. 466; Joslin v. Cowee, 56 N. Y. 626; Fitzsimmons v. S. W. Ex. Co., 40 Ga. 330; Adams Mining Co. v. Senter, 26 Mich. 73.

[22] 1 Bell v. McConnell, 37 Ohio St. 396; Rice v. Wood, 113 Mass. 133.

[23] A custom, to vary a settled rule of law, must be reasonable, long established and so well known as to acquire the force of law, uncontradictory and distinct. The rule applied in a case where the evidence was held not sufficient to support a custom to pay brokers' commissions, where the sale was effected through the instrumentality of another. Pratt v. Bank,

in the absence of such uniform custom or usage, the measure of the broker's compensation should be the value of the services rendered, to be ascertained as in other cases of employment.[24]

§ 240. **Sub-agents—Delegation of authority.** The general rule of law is that a delegated power cannot be delegated; therefore an agent has no right to transfer his authority to a sub-agent without the consent of his principal. If, in the absence of such consent, he does delegate his authority, the sub-agent whom he appoints will be regarded as his agent and not the agent of the principal;[25] and if an agent in the conduct of his agency employs a sub-agent without authority to bind his principal, either expressly given or fairly presumptive from the particular circumstances or the usage of the business, the sub-agent must look to his immediate employer for his pay, and has no claim for compensation against the agent's principal, between whom and the sub-agent no privity exists.[26]

12 Phil. (Pa.) 387. Usage is not readily adopted by the courts; therefore the proof of usage must be clear and explicit, and the usage so well established, uniform and notorious that parties may be presumed to have known it, and contracted in reference to it. Hall v. Storrs, 7 Wis. 253. It being the established usage of land agents in Milwaukee to charge and receive three per cent of the amount of the purchase money on sales effected through their agency, *held*, in a suit brought by P., a land agent there, against K. for the three per cent, to which he claimed to be entitled according to such usage, where K. had employed him to sell certain lands for him at a certain price, and P. found a person ready and willing to purchase the lands on K.'s terms, but K. refused to sell, that P. was not entitled to recover on such implied contract until the consummation of the sale, and it made no difference whether the sale was prevented by K. himself or the want of a purchaser; whether P. could recover on a *quantum meruit*, *quere*. Power v. Kane, 5 Wis. 265.

[24] Potts v. Aechternacht, 93 Pa. St. 138.

[25] Davis v. King, 66 Conn. 465; Wright v. Boynton, 37 N. H. 9; Connor v. Parker, 114 Mass. 331; Loomis v. Simpson, 13 Iowa 532.

[26] A special agent acting simply by virtue of a power of attorney to sell and convey certain real estate cannot employ a broker to procure a purchaser and negotiate a sale, so as to raise a privity between his principal and the broker, and give the latter a right of action for his compensation directly against his principal. Jenkins v. Funk, 33 Fed. Rep. 915; and see Hand v. Conger, 71 Wis. 292; Corbett v. Schumacker, 83 Ill. 403.

CHAPTER VIII.

SALES BY AUCTION.

§ 240. Generally.
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§ 240. Generally. An auction is generally defined as a competitive sale at which the highest bidder becomes the purchaser. As a mode of sale it is of very great antiquity,[1] and, in some cases, is the only method of disposition which the law permits. Real property is very often sold at auction, not only in pursuance of the judgment or decree of some legal tribunal and as the result of some proceeding theretofore had, but also by the mere volition of the vendor. It is a method frequently resorted to as a means of inaugurating settlements in sparsely-populated districts, opening new subdivisions adjacent to cities, or for the more speedy disposal of property in any locality, or with a view to an increased price by reason of competitive bidding.

[1] The Romans had their auctions, outcries, and port sales, which were performed by the public crier, and called *sub hasta*, from their being in early times the sale of the spoils taken in war, and a spear being erected as the signal of the auction. The same signal was afterwards used in other sales, which were made under the superintendence of particular tribunals. It was termed *auctio*, q. d. increase because the goods were sold to him *qui plurimum rem augerit*, who bids most for them. A spear was fixed in the Forum, by which stood a crier, who proclaimed the articles intended to be sold. A catalogue was made in tables called *auctionariae*. The seller was called *auctor*, and the bidders *sectores*, who signified their biddings by

In all its essential features an auction sale differs in no respect from a sale made through private negotiation, and consists only of an invitation for proposals, an offer and an acceptance. The same rules that apply in the one case are of equal force in the other; the only difference lies in the method, and this has called forth a few rules which it is proposed to briefly discuss in this chapter.

§ 241. **The sale.** A sale by auction may be made on the premises or at any other place designated in the notice thereof, and must be conducted fairly and honestly. The terms and conditions must be made known before the biddings have commenced, and in ordinary cases the auctioneer will have the right to prescribe the rules of bidding and the terms of sale; provided he does not contravene the written particulars and conditions, if there are any. When the biddings have once commenced they should be continued as long as any person will increase upon the previous bidding.

§ 242. **Sales "without reserve."** It is not an uncommon practice to announce a sale "without reserve;" and while this would probably be implied by law where no reservation was made by the vendor, yet when so stated it has the effect of creating an express contract between the vendor and the highest *bona fide* bidder that the sale shall be so conducted.[2] If under these circumstances a bid is made by or on behalf of the vendor, he thereby becomes responsible in damages to the highest bidder for a breach of the conditions of sale, or the sale may be avoided at the option of such purchaser.[3]

§ 243. **Particulars and conditions of sale.** In every sale of real property at public vendue there should first be prepared a notice of sale which, as a rule, should describe the property to be sold, and state the time, place, and terms of sale. In all judicial and execution sales this is an indispensable require-

lifting up their fingers. The highest bidder became the purchaser, and the term *auctoritas* denoted the right of property, which the sale vested in the purchaser. The phrase *sub hasta venire* (literally, to be sold under the spear), therefore, denoted a sale by auction. Bateman, Auctions, 1.

[2] The term "without reserve" is understood to exclude all interference by the vendor or those coming in under him with the right of the public to have the property at the highest bidding.

[3] Flannery v. Jones, 180 Pa. St. 338.

ment and in private sales its equivalent should be represented in some manner. The particulars of sale become a part of the contract, they cannot be varied by verbal declarations of the auctioneer at the time of the sale, and are usually to be construed strictly against the vendor.

§ 244. **Sale by plat.** Where, at an auction sale of real property, the lots are delineated upon a plan or plat which is exhibited to bidders and to which bidders are referred, such reference is the assertion of a positive fact, which, if material, enters into the consideration, and if false is a ground of relief where its falsity was unknown to the purchaser, and he has taken no covenant to protect himself. The plat is an evidence of the existence and location of streets, etc., and if referred to in the deed of conveyance becomes a material and essential part thereof. The representation of streets, alleys, etc., upon a plat is a positive affirmation that such exist, and upon which purchasers have a right to rely. The untruth of such representations cannot in many cases be readily discovered, even by the exercise of ordinary diligence; and as he who sells property by a description given by himself is bound to make that description good, so a vendor who at a sale by public auction misleads and injures the purchaser, even though there is an absence of wilful fraud on his part, must nevertheless remain liable for any injury caused by his incorrect representation.[4]

§ 245. **Auctioneer's relation to the parties.** An auctioneer is essentially an agent, and his contract is that of agency. Until the fall of the hammer he is exclusively the agent of the vendor, but after this he becomes the agent of the purchaser

[4] As where a master and commissioners in partition divided a decedent's land and laid out a street bounding on the line of an adjoining landholder. Afterwards, but before the partition was put on record or the street opened, the latter laid out a town plat, which was lithographed. It exhibited the street, with streets on his own plat opening into it; but the seller gave no information that the first-named street was on his neighbor's land. He sold lots at auction according to the plat which was exhibited on the day of sale. The plat of the commissioners was afterward set aside and the street vacated. *Held*, that the vendor was liable for damages to a vendee of lots for diminution in the value thereof caused by the non-existence of the vacated street. McCall v. Davis, 56 Pa. St. 431.

as well, and his memorandum of the transaction binds both parties.[5] The position of an auctioneer differs in some respects, however, from that of an ordinary agent; and where the subject of the sale is land it has been said that, by reason of his right to bring an action and of his liability to account for the deposit, he can be made a co-plaintiff with the vendor in an action for specific performance, and he is not infrequently made a co-defendant in such an action.[6] He may sue in his own name upon evidences of debt that may have been given to him in payment of the deposit;[7] and, as a necessary incident of his power to sell, may receive and receipt for so much of the purchase money as is paid down at the time of sale.[8]

As between himself and the vendor his agency is general, and whatever acts are usually performed by auctioneers or whatever rights are ordinarily exercised by them are deemed incidents to his authority; and, in like manner, whatever duties ordinarily attach to the office are deemed imposed upon him. He is subject, nevertheless, to the special instructions of his principal; and his rights and duties under his general agency are further subject, as regards third persons, to their having notice of such special instructions. After the fall of the hammer he becomes the mutual agent of both vendor and vendee, and his action is competent to bind both parties to the sale.[9]

The foregoing remarks apply, however, only where the auctioneer would be a competent agent in any other species of land sale. His agency as an auctioneer is not essentially different from agency in general, and is governed practically

[5] White v. Crew, 16 Ga. 416; Morton v. Dean, 13 Met. (Mass.) 397; Harvey v. Stevens, 43 Vt. 653; O'Donnell v. Leeman, 43 Me. 158; Doty v. Wilder, 15 Ill. 410; Gill v. Hewitt, 7 Bush (Ky.) 13; Walker v. Herring, 21 Gratt. (Va.) 678.

[6] See Bateman on Auctions, 211.

[7] Thompson v. Kelly, 101 Mass. 291.

[8] Goodale v. Wheeler, 11 N. H. 424; Adams v. Humphrey, 54 Ga. 496; Rodgers v. Bass, 46 Tex. 505.

[9] While the statements of the text have ever been taken and accepted as true with regard to sales of chattels there has been some diversity of opinion in respect to sales of realty, and in some instances contrary conclusions have been reached. The later cases, however, adopt and declare the doctrine of the text; and there does not seem to be any good reason why the auctioneer shall be viewed as the agent of the purchaser in the sale of goods which does not equally apply to the sale of lands.

by the same rules. Hence a vendor acting as his own auctioneer, being a party to the sale and a necessary party to a suit to recover the purchase money, is incompetent to act in the transaction as the agent of the buyer.[10] And it is immaterial, so far as affects the operation of this rule, whether the auctioneer has himself any beneficial interest in the contract or simply stands in a fiduciary relation to a third person, so long as he is, in legal point of view, the real party to and the proper one to sue upon the contract.[11]

§ 246. **Auctioneer cannot delegate authority.** Where an auctioneer is employed to sell he must himself conduct the sale, and cannot, without special authority, delegate his powers to another.[12] With regard to merely subsidiary matters he may employ others to assist him, as to make the outcry or ply the hammer;[13] but everything directly connected with the sale must be conducted under his immediate supervision.[14]

§ 247. **Withdrawing bid.** Mutuality is essential to the validity of all contracts, and so vitally necessary is it to such as are not under seal that they cannot be said to exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance; and a bidder has a right to withdraw his offer at any time before the property is struck off to him. In such case there is no contract; and such bidder cannot, in any sense, be regarded as a purchaser.[15] The brief interval between the bid and its acceptance, it is said, is the reasonable time which the law allows for inquiry, consideration, correction of mistakes and retraction.[16]

§ 248. **Refusing bid.** An auction being an open sale, the auctioneer cannot in general refuse to accept a bid, though it seems that he is not obliged to take the bid of a person of known irresponsibility,[17] and may refuse such bid when its

[10] Tull v. David, 45 Mo. 444.

[11] See Browne, Stat. Frauds, § 367; 3 Par. Cont. 11. But these remarks do not apply to a sheriff or like officer acting simply in the execution of a power of sale and not in strictness as a trustee.

[12] Stone v. State, 12 Mo. 400; Commonwealth v. Hamden, 19 Pick. (Mass.) 482.

[13] Poree v. Bonneval, 6 La. Ann. 386.

[14] Chambers v. Jones, 72 Ill. 275.

[15] 1 Addison, Cont. 18.

[16] Fisher v. Seltzer, 23 Pa. St. 308.

[17] Den v. Zellers, 7 N. J. L. 153; Hobbs v. Beavers, 2 Ind. 142.

acceptance would have the effect of frustrating the very purpose for which the sale was designed, notwithstanding such bid may be nominally the highest.[18] So, also, he may refuse the bid of a minor or other person legally incapable of making an enforceable contract.[19]

If the sale is without reserve, he should not accept a bid from the vendor or any one acting in his behalf.

§ 249. Auctioneer's statements and representations. It is the duty of the auctioneer, as the representative of the vendor, to obtain the highest price attainable for the land, and to this end he may make any statements or representations calculated to inspire competition among bidders, provided same are true. He may even advance opinions of his own, and, when made simply as opinions and not as statements of fact, it is, it seems, immaterial how visionary or destitute of foundation they may be. But where he makes a misstatement of fact or a misrepresentation which is calculated to, and does, affect action on the part of bidders, or where his statements have a strong tendency to induce buyers to refrain from inquiry, any bidder who is thus misled to his injury will not be bound by his bid. Where sales are made by auction it is usually impracticable for a bidder to verify statements made by the auctioneer before making his bid: for this reason he has a right to rely on statements so made and to refuse to consummate the sale should they prove untrue.[20]

§ 250. Puffers and by-bidders. A puffer, in the strictest meaning of the word, is a person who, without any intention of purchasing, is employed by the vendor at an auction sale to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor that he shall not be bound by his bids.[21] The legal effect of such employment upon the sale was for many years a disputed question in the courts of England, the common-law and chancery courts having at different times formulated rules variant and even

[18] See Murdock's Case, 2 Bland, Ch. (Md.) 46.

[19] Kinney v. Showdy, 1 Hill (N. Y.) 544.

[20] Roberts v. French, 153 Mass. 60; Stevens v. Giddings, 45 Conn. 507.

[21] Peck v. List, 23 W. Va. 338.

contradictory.[22] As might be expected, the courts of the United States have to a considerable extent rendered conflicting decisions on the subject, some following the rules of the English common-law courts, and others those promulgated by the courts of chancery; but the weight of authority now is and at all times has been to condemn the practice as inconsistent with common honesty and fair dealing.[23] It is fundamental that the basis of all commercial transactions should be in good faith; and more especially is this true when the public are brought together upon a confidence that the article set up for sale is to be disposed of to the highest bidder, which could never be the case if the owner might privately and secretly enhance the price by a person employed for the purpose. The offer of property at auction without reserve is an implied guaranty that it is to be sold to the highest bidder; and each bidder has the right to assume that all previous bids are genuine. The seller in substance so assures him, and the secret employment by the seller of an agent to make fictitious bids is equivalent to a false representation by him as to a matter in which he is bound to speak the truth and act in good faith.[24] Such an act, therefore, is a positive fraud upon the purchaser, and should be, as it is, sufficient in itself to vitiate the sale,[25] unless the purchaser with knowledge of the fact has acted upon it, so as to deprive himself of the right to complain.[26]

[22] The law courts held that bybidding or puffing was a fraud, and that any highest bidder who had been deceived by it could avoid his contract or refuse to carry it out; whereas the equity courts were disposed to countenance it so long as it was employed defensively to prevent a sacrifice. The doctrines at common law and in equity have recently (1867) been assimilated in England (at least so far as regards auction sales of real estate) by statute, making the rule at common law likewise the rule in equity.

[23] Pennock's Appeal, 14 Pa. St. 449; Bank of Metropolis v. Sprague, 20 N. J. Eq. 159; Reynolds v. Dechaums, 24 Tex. 174; Peck v. List, 23 W. Va. 338; Curtis v. Aspinwall, 114 Mass. 187; Towle v. Levitt, 23 N. H. 360; Veazie v. Williams, 8 How. (U. S.) 134.

[24] Curtis v. Aspinwall, 114 Mass. 187.

[25] Towle v. Leavitt, 23 N. H. 360; Stains v. Shore, 16 Pa. St. 200; Flannery v. Jones, 180 Pa. St. 338; Bank of Metropolis v. Sprague, 20 N. J. Eq. 159; Bayham v. Boch, 13 La. Ann. 287; Darst v. Thomas, 87 Ill. 222.

[26] Peck v. List, 23 W. Va. 338;

Ordinarily by-bidders are employed by the owner of the property to be sold, and when such is the case they are puffers in the strictest sense of the word; but it is unimportant whether the by-bidder is employed by the owner of the land or by some one else having a pecuniary interest in the sale, and who can make good his assurance to the by-bidder that he shall not be held resonsible for his bid if it happen to be the highest made. The real essence of the fraud is not that the owner is bidding for the property, but consists in the fact that a person pretending to be a *bona fide* bidder deceives honest bidders, raises the price of the property by fictitious bids, increasing competition, while he himself has good reason to believe and does believe that he is secure from any risk of being held personally liable for his offers; and it is immaterial from whom he derives this assurance of immunity provided the party giving the same has the power to make it good.[27]

There are American cases which seem to lay down the rule that the owner may protect himself against a sacrifice of the property by "bidding in" the same; that persons employed by him for this purpose are not to be classed as puffers where the price is not enhanced beyond a fair value,[28] and that such employment, if made in good faith, will not vitiate the sale;[29] but it is difficult to reconcile the reasoning or the result of such cases with the commonly-accepted rules first stated, or to understand how the element of good faith can be made to apply, unless the owner has publicly reserved to himself the exercise of such right.

The doctrine as just stated had its origin in the chancery

Pennock's Appeal, 14 Pa. St. 449; Backenstoss v. Stahler, 33 Pa. St. 251; Latham v. Morrow, 6 B. Mon. (Ky.) 630.

[27] Peck v. List, 23 W. Va. 338.

[28] Davis v. Petway, 3 Head (Tenn.), 667; Reynolds v. Dechaums, 24 Tex. 174; Lee v. Lee, 19 Mo. 420; Walsh v. Barton, 24 Ohio St. 28; and see Phippen v. Stickney, 3 Me. 387; Latham v. Morrow, 6 B. Mon. (Ky.) 630; Pennock's Appeal, 14 Pa. St. 446.

[29] Davis v. Petway, 3 Head (Tenn.), 667. In this case executors employed a person of experience to assist them in the selling of lands; the property was divided and an estimate of value placed upon the several lots. During the progress of the sale, when the biddings for any particular tract were below the estimated value, the person employed to conduct the sale would request some one of the bystanders to bid for the same, and in no instance exceeding the minimum value previously placed on

courts of England and for many years it seems to have been the custom in that country to reserve a bidding for the owner or for some person to be employed, covertly or otherwise, to bid on his behalf, so that the property might not be sold at any considerable loss. But the general tendency of the English courts has been to discourage such practices and a resume of the later cases would seem to declare the rule that if due notice be given to the public of the owner's intention to bid, or to employ an agent to bid in his behalf, the transaction will not be held fraudulent or unfair or the sale thereby vitiated. But where the fictitious bidding is done clandestinely, even though one person only is appointed, the sale will be held fraudulent.[30]

§ 251. **Vendor as bidder.** If the owner's employment of puffers who bid at an auction sale of his property avoids the sale, and that such is the fact may now be considered the settled doctrine, it follows from the same reasons that the owner has no right to bid himself unless he publicly reserves such right.[31] It is true that the spectacle of a vendor openly appearing as a bidder at a sale of his own property is a matter of most infrequent occurrence, and the practice as a rule is never publicly avowed. Yet there are many indirect ways in which it may be and is accomplished.

Undoubtedly the vendor may bid, by himself or his agent, to the extent to which he has expressly reserved the right so to do, provided proper notice is given so that no one will be misled or deceived;[32] but if the property is put up with a right of bidding once reserved to the vendor, that right is exercised if the auctioneer with the vendor's authority start the property at a certain sum; and the purchaser may avoid the contract if the auctioneer make or accept a further bidding for the vendor.[33]

§ 252. **Combinations among bidders.** It is illegal for persons intending to purchase at auction sales to combine and

the tract. Upon these facts the court refused to grant the vendee any relief against the sale. And see Latham v. Morrow, 6 B. Mon. (Ky.) 630.

[30] Bateman on Auctions, 164.

[31] Baham v. Baeh, 13 La. Ann. 287.

[32] Miller v. Baynard, 2 Houst (Del.), 559.

[33] Bateman, Auctions, 122.

enter into agreements not to bid against each other. The policy of the law is opposed to any act which prevents full and fair competition, or is calculated to depreciate values or injure the sale,[34] and contracts made under such circumstances are incapable of legal enforcement at the suit of the conspiring bidder.[35]

But this rule is confined to cases where there is an agreement not to bid with a view of stifling competition, and does not extend to cases where several persons join to make a purchase for their common benefit without an agreement not to compete;[36] nor to cases where several creditors, no one of whom would be willing to purchase a property of so large value, unite to purchase. Such a union is calculated to enhance the price rather than injure the sale; and where such persons agree together that they will authorize one person to bid for the property on their joint account the agreement will not be considered unlawful.[37] Whether such a combination is fraudulent or not depends upon intention. *Prima facie* it would not be fraudulent, and could only be made to appear otherwise by showing that such an arrangement was made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the property offered for sale below the fair market value. In such an event the sale might be avoided as between the parties as a fraud upon the rights of the vendor. It is the end to be accomplished that makes such combinations lawful or otherwise; and if the arrangement is entered into for no fraudulent purpose, but for the mutual convenience of the parties, as with a view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid

[34] Easton v. Mawkinney, 37 Iowa, 601; Bellows v. Russell, 20 N. H. 427; Jenkins v. Frink, 30 Cal. 586; Gardiner v. Morse, 25 Me. 140; Hook v. Turner, 22 Mo. 333; Dudley v. Odom, 5 S. C. 131.

[35] Barton v. Benson, 126 Pa. St. 431.

[36] Jenkins v. Frink, 30 Cal. 586; Phippen v. Stickney, 3 Met. (Mass.) 388; and see Gardiner v. Morse, 25 Me. 140.

[37] Bank v. Sprague, 20 N. J. Eq. 159; Bellows v. Russell, 20 N. H. 427; Bradley v. Kingsley, 43 N. Y. 534; Gulick v. Webb, 41 Neb. 706.

and binding,[38] notwithstanding it may indirectly have the effect of keeping others from bidding.[39]

It will be seen, therefore, that no definite rule can be announced that will be controlling in every case, and courts will look beyond the mere fact of an association of persons formed for the purpose of bidding at a sale. If upon examination it is found that the object and purpose of the association is not to prevent competition, but to induce and enable the persons composing it to participate in the biddings, the sale should be upheld; otherwise if entered into for the purpose of shutting out competition and depressing the sale so as to obtain the property at a sacrifice. Each case must depend upon its own circumstances, and it is competent for courts to inquire into them and to ascertain and determine the true character of each.[40]

§ 253. **Auctioneer's memorandum.** It was formerly thought that sales by auction were not within the meaning of the statute of frauds for the reason that the publicity of the sale was sufficient to guard against fraud and perjury, but this doctrine has long been repudiated and the general rule now is that auction sales stand upon the same footing as other sales of realty, and that a memorandum is essential to sustain the same. An auctioneer, however, when selling real estate at auction, acts as the agent of both vendor and vendee; and his entry in the sale-book,[41] at the time of the sale, containing a description of the property sold, the name of the vendor[42]

[38] Jenkins v. Frink, 30 Cal. 586. An agreement between A. and B. that B. will permit A. to buy a tract of land which is to be sold at auction, and that A. will buy it and convey a certain part thereof to B. at an appraisement to be made by certain persons, is not void on its face for illegality. Phippen v. Stickney, 3 Met. (Mass.) 384.

[39] Gulick v. Webb, 41 Neb. 706; Breslin v. Brown, 24 Ohio St. 565; Barling v. Peters, 134 Ill. 606; Smith v. Ullman, 58 Md. 183.

[40] Kearney v. Taylor, 15 How. (U. S.) 519; and see Bradley v. Kingsley, 43 N. Y. 534; Jenkins v. Frink, 30 Cal. 586; Easton v. Mawkinney, 37 Iowa, 601; Fenner v. Tucker, 6 R. I. 551; Loyd v. Malone, 23 Ill. 43; Miltenberger v. Morrison, 39 Mo. 71; Phippen v. Stickney, 2 Met. (Mass.) 384.

[41] The entry by a clerk, under the direction of the auctioneer, will be regarded as the act of the auctioneer. Doty v. Wilder, 15 Ill. 407.

[42] This is very important and a matter that is often neglected, particularly with respect to the

and purchaser, the price and terms, is a sufficient memorandum in writing, within the intent of the statute of frauds, and binds both parties.[43] But to effect this the memorandum must on its face, or in connection with some writing,[44] contain everything necessary to show the contract between the parties with such reasonable certainty that its terms may be understood from the writing itself without recourse to parol proof.[45]

With regard to the form of the memorandum, it would not seem that it is necessary that in case of sales of several parcels a special note embodying all the foregoing features should be made for each parcel sold; nor is this the general practice of auctioneers. As a rule, a general memorandum entered in a book by the auctioneer at the commencement of an auction sale, showing the name of the person on whose account the

vendor. An auctioneer's memorandum will not satisfy the requirements of the statute of frauds unless it names or describes the vendor. Thus, where a sale was made at public auction, and the advertisement of same stated the sale to be made "to settle the estate of John Higgins," a memorandum made by the auctioneer, neither naming the vendors nor describing them, except to designate them as the "sellers" was held fatally defective, although the parties for whom the sale was made were the devisees of John Higgins. McGovern v. Hern, 153 Mass. 308; Mentz v. Newwitter, 122 N. Y. 491; but compare Lee v. Cherry, 85 Tenn. 707.

[43] Doty v. Wilder, 15 Ill. 407; Walker v. Herring, 21 Gratt. (Va.) 678; Morton v. Dean, 13 Met. (Mass.) 385; Johnson v. Buck, 35 N. J. L. 342; Stadleman v. Fitzgerald, 14 Neb. 292; Pike v. Balch, 38 Me. 302.

[44] To satisfy the statute of frauds it is sufficient that the terms of the bargain may be gathered from two or more separate papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former; but the connection between the signed and unsigned papers cannot be made by parol evidence that they were intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. Johnson v. Buck, 35 N. J. L. 338. Thus, an indorsement on an order of sale by a sheriff, as follows: "Sold to A. B. for $2,400, Oct. 16, 1869," signed "C. D., sheriff," was *held* not a sufficient contract or memorandum of sale within the Indiana statute of frauds. The fact that such memorandum was indorsed on the order of sale, but without any reference to it for the ascertainment of the thing sold, is no better than if indorsed on any other paper. Ridgeway v. Ingram, 50 Ind. 145.

[45] Doty v. Wilder, 15 Ill. 407; Gwathney v. Cason, 74 N. C. 5; Ridgeway v. Ingram, 50 Ind. 145; McGovern v. Hern, 153 Mass. 308; Mentz v. Newwitter, 122 N. Y. 491.

sale is made, the nature of the property, the terms of payment, referring to entries following the names of purchasers and lots struck off to each, and signed by the auctioneer, under which he enters the name of each purchaser, the description of the property sold and the price, is a sufficient memorandum within the statute.[46] In every instance, however, the auctioneer's memorandum must, either in itself or in connection with other writings made a part of it, conform in all respects to the rules as laid down for agreements between parties on private sale;[47] and a memorandum setting forth the names, price, description and fact of part payment, but not the "conditions of sale," which it states the vendor shall duly observe and fulfill, would be insufficient within the statute of frauds.[48] So, also, an unsigned memorandum of an auctioneer, unconnected by annexation or reference with any writing duly authenticated by the signature of the party sought to be charged, is not a memorandum within the meaning of the statute.[49]

It is further essential to the validity of the auctioneer's memorandum that he shall sustain no relation toward the vendee inconsistent with the true character of an agent. The chief reason in support of the rule that an auctioneer, acting solely as such, may be the agent of both parties to bind them by his memorandum is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and equally entitled to the confidence of both parties. But this reason fails where he is a party to the contract and a party in interest also. Hence, a vendor cannot act as the auctioneer

As where an auctioneer, on selling real estate to S. D. at auction, after reading or exhibiting written conditions of sale, made this memorandum in writing: "Sale, on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail-works, water-privilege, buildings and machinery, agreeable to the plans and schedule herewith. Sale to Silas Dean for $30,300. April 5th, 1843." *Held* that, as this memorandum did not contain nor refer to the conditions of sale, it did not take the case out of the statute of frauds. Morton v. Dean, 13 Met. (Mass.) 385.

[46] Price v. Durin, 56 Barb. (N. Y.) 647; Springer v. Kleinsorge, 83 Mo. 152.

[47] See Grafton v. Cummings, 99 U. S. 100; Knox v. King, 36 Ala. 367; Brown v. Whipple, 58 N. H. 229; Lincoln v. Preserving Co., 132 Mass. 129; Drake v. Seaman, 97 N. Y. 230.

[48] Riley v. Farnsworth, 116 Mass. 223.

[49] Rafferty v. Longee, 63 N. H. 54.

of his own sale. It requires no demonstration to show that the mischief intended to be prevented by the statute of frauds would still continue to exist if one party to a contract could make a memorandum of it which could absolutely bind the other. If such were the case the statute would furnish no security against fraud; for the vendor could fasten his own terms on his vendee, and, the contract being in writing, the vendee would be unable to show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale, and the publicity of a sale by auction would be no safe-guard against false statements of the terms of sale made in the written memorandum signed by a party acting in double capacity of auctioneer and vendor. Nor can it make any difference as to the power of the vendor to make the memorandum binding on the vendee that the sale is made by the former in his representative or fiduciary character as executor, administrator, guardian, trustee, etc. He is still the party to the contract; the price is to be paid to him; he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented; and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to the vendee. He would, therefore, stand in a relation which would necessarily disqualify him from acting as the agent of both parties.[50]

§ 254. **Who may make the memorandum.** It goes without saying that an auctioneer's memorandum should be made by the auctioneer, yet in many cases this is not actually done, and where the auctioneer plies the hammer it is usual to commit the clerical part of the work to others. This has resulted in some conflict of authority as to who may legally make the memorandum of sale. The doctrine may now be considered as fairly settled, however, that entries of auction sales made by the auctioneer's clerk, if he is a disinterested person, will be sufficient to bind the parties when the property exposed for sale is finally knocked down.[51] But this is the

[50] Bent v. Cobb, 9 Gray (Mass.), 397; Tull v. David, 45 Mo. 444.

[51] Howell v. Shewell, 96 Ga. 454; Smith v. Jones, 7 Leigh (Tenn.), 165.

limit, and the fact of disinterestedness is an essential factor of validity. Hence, neither the vendor nor his agent may act as such clerk, and in the event that they should assume such employment the memorandum would not bind the purchaser[52] unless he also signed it.[53]

§ 255. **Auctioneer's receipt as memorandum.** Where, as is the almost universal practice, a deposit is required at the time of sale, a receipt therefor given by the auctioneer will in many cases amount to a valid agreement on the part of the vendor within the statute.

§ 256. **The deposit.** An almost invariable rule in sales by auction is for the purchaser to pay something at the time of sale; and the amount or the method of its ascertainment is always made a part of the terms and conditions upon which the sale is made. This payment, which is technically termed a deposit, is considered as a part of the purchase money, and not as a mere pledge.[54]

Usually where the purchaser fails or refuses to perform the contract the deposit is forfeited to the vendor,[55] although this is a matter largely dependent on intention; and, while this result is allowed to prevail in all cases where it forms a special clause in the conditions of sale, it will also follow in other cases if it can be implied from the contract that such was the intention of the parties. A stipulation that the deposit shall be forfeited to the vendor in case the vendee fails to comply with the residue of the terms of sale is not unreasonable,[56] and numerous cases announce the rule that one who so purchases and then makes default will be precluded from recovering the sum so paid.[57] It has been held, however, that the deposit will not be forfeited upon the purchaser's failure to comply where there is no provision to that effect in terms.[58]

[52] Howell v. Shewell, 96 Ga. 454.

[53] See Bamber v. Savage, 52 Wis. 110.

[54] Kelly v. Thompson, 101 Mass. 291.

[55] Curtis v. Aspinwall, 114 Mass. 187.

[56] Donahue v. Parkman, 161 Mass. 412.

[57] Sage v. R. R. Co. 99 U. S. 334; Thompson v. Kelly, 101 Mass. 299; McKinney v. Harvie, 38 Minn. 18; Cobb v. Hall, 29 Vt. 510; Galway v. Shields, 66 Mo. 313.

[58] Bleeker v. Graham, 2 Edw. Ch. (N. Y.) 647. The English cases announce a different rule, see *Ex parte* Barrell, L. R. 10, ch. 512; Howe v. Smith, 27 Ch. Div. 89.

If the title prove defective, or if the contract is rescinded on the ground of fraud or misrepresentation on the part of the vendor, or if the vendor refuses or is unable to perform it, or if for any other reason the sale be avoided without fault on the part of the purchaser, the deposit must be returned.

Where land is sold at auction and a deposit is required, the auctioneer is the proper custodian thereof; he should safely keep it and pay it to neither party without the consent of the other until the sale is completed.[59] The auctioneer, in this event, is regarded as a stakeholder for both parties. But where the purchaser suffers a long time to elapse, and by other acts there appears to be an intention on the part of the purchaser to consider the owner of the property entitled to it, a recovery will not be permitted as against the auctioneer in a suit by the purchaser for the deposit after the latter has paid it over to the owner.[60] As a rule, however, he should not part with the deposit until the sale has been either rescinded or carried into effect; if both parties claim it he may file a bill of interpleader and pay the money into court.

§ 257. Refusal to comply with bid—Resale. One of the most common features inserted in conditions of sale, where property is exposed at public auction, consists in the provision for resale in case of purchaser's default. By this provision the purchaser is usually allowed a limited time within which to comply with the terms of sale, and in case of his neglect or refusal so to do within the time limited the property may then be resold on account of the first purchaser. Where the terms of sale presented by the auctioneer as forming the conditions of the contract contain a provision of this character the legal effect of the same is to extend to the vendee an option of taking the estate after it is bid off by him or having it sold again on his account. If upon resale it produces more than on the first sale the surplus would belong to him; if, on the other hand, it should sell for less, the difference would form a loss to

[59] Teaffe v. Simmons, 11 Allen (Mass.), 342.

[60] Ellison v. Kerr, 86 Ill. 427. In this case nearly five months after an auction sale of land the vendor gave the purchaser a contract of sale acknowledging the receipt of the deposit money, and the purchaser through whose acts the auctioneer had been induced to pay the deposit to the vendor suffered two years to elapse after the sale before making demand for the deposit. *Held*, that the

which he would be exposed, and for which an action would lie against him by the vendor;[61] but, it seems, no action could be maintained by the vendor against such purchaser for a breach of the contract until a resale had been had and a deficit ascertained.[62]

But while the rule is well settled that when a vendee has refused to comply with his bid, and complete the sale, the land may be resold for his account and risk, there is yet some confusion with respect to the method of procedure so as to render the result of the resale legally binding upon him. It would seem that in order to conclude such bidder the resale must be made without unreasonable delay, with the same publicity, and, as far as possible, under the same conditions, as the first sale, and with an honest effort to secure the best price obtainable. The defaulting bidder should further have notice that the resale will be made and at his risk. The reason for this is, as above indicated, that the land is regarded in some sense as the property of the bidder and the result of the resale is in the nature of an adjudication against him; hence, before he can be charged with a deficiency he should be afforded an opportunity to protect his interest and prevent a sacrifice of the property. In the event of a failure to give such notice the vendee has a right to assume, if the land is again sold, that the vendor has elected to retain same and deal with it as his own. As to the extent of the notice the authorities do not seem clear. In some cases notice of the time and place of the resale has been held necessary, but the better rule would seem to be that where there is a notice of an election to resell and to hold the bidder for any deficiency, no other or further notice is necessary.[63]

general rule that the auctioneer is the stake-holder of both parties had ceased to apply, and the purchaser could not recover the deposit.

[61] Green v. Ansley, 92 Ga. 647; Kempner v. Heidenheimer, 65 Tex. 587.

[62] Webster v. Hoban, 7 Cranch (U. S.), 399.

[63] Lewis v. Greider, 51 N. Y. 236; Green v. Ansley, 92 Ga. 647.

PART II.

INCIDENTS OF THE CONTRACT.

CHAPTER IX.

INVESTIGATING THE TITLE.

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§ 258. General principles. Under the usages now prevailing it is customary, upon the negotiation of a trade, to allow the vendee a sufficient time to investigate the character of the title he is purchasing, and provision for such investigation is ordinarily incorporated in the agreement of sale. There is no positive law upon the subject, and the time is generally variously fixed at from ten to sixty days, adapting itself to the exigencies of the occasion or the convenience of the parties. Sometimes this *interim* between the commencement and completion of sale is made essential by the terms of the agreement, and if the vendee fails to comply with the terms of the contract within the time stipulated it gives to the vendor a right of forfeiture of the contract and of whatever may have been

paid by way of earnest-money; but unless this consequence clearly follows as a matter of fair construction, time will not be deemed essential, and until the vendor has put the vendee in default by some recognized legal method, or unless the vendee has voluntarily abandoned the undertaking, he will be permitted to complete the purchase within any reasonable time after its inception.

The duty of careful inquiry into the title is imposed upon the vendee by law; and this duty he cannot forego, unless by reason of the representations of the vendor he is prevailed upon so to do. The law presumes that every man, not being under any legal disability, will make due investigation with respect to the thing he is about to purchase, and that he buys with full knowledge of all the facts that such investigation would disclose; and while he is permitted to recover upon any express agreement that he may have taken by way of covenant, yet if he fails to so protect himself he buys at his peril, and cannot afterwards be heard to complain unless some fraud has been practiced upon him.

The usual means provided for an inquiry into the title is an abstract of the public records, as it is usually called, an abstract of the title; but in case this is not furnished the duty of examining the records will devolve upon the vendee, and he is charged with constructive notice of every fact which such an investigation would have disclosed. In addition thereto he must also notice the character of the possession of the premises; and if any information is brought home to him, calculated to impart knowledge or to apprise him of any rights or interests in conflict with those which he is about to purchase, he must duly prosecute an inquiry in relation thereto.

In the following paragraphs nothing more than a general survey of the subject is attempted; and in order to avoid repetition a number of topics which properly come within the scope of the chapter are omitted, as they can be more advantageously treated in connection with other matters to which they directly relate, and to which the reader is referred.[1]

[1] See *post*, "Fraudulent Conveyances;" "Conveyances subject to Incumbrance," etc.; also the succeeding chapter on "Objections to Title."

§ 259. **Doctrine of caveat emptor.** The law will not extend its protection to those who, through negligence or inattention to their business, suffer an advantage to be taken of their credulity, nor excuse them for a neglect to examine and by proper observation to ascertain whether that which they propose to purchase corresponds to their desires or anticipations. It is the vigilant whom the law regards, not those who sleep on their rights; and if, through inattention, neglect or blind credulity, it turns out that the title of land is defective, or that the property itself is inadapted to the purposes for which it was purchased, the vendee will ordinarily be entitled to no relief, at law or in equity, except as he may find it through the covenants he has received; and if he has further neglected to protect himself by covenants, he is practically without a remedy on a subsequent failure of title.[2]

This doctrine is known in the law by the term *caveat emptor*. The maxim, "let the purchaser beware," although now in very common use in connection with sales of land, originally applied only to sales of chattels and its more peculiar significance had reference to questions of fraud and implied warranty. In time, however, the meaning became extended, and at present indicates an assumption of risk in sales of realty as well as personalty,[3] and if a purchaser buys land and takes conveyance thereof without warranty, he assumes whatever risks may attend the transaction, and so far the rule of *caveat emptor* may be said to apply to him.

§ 260. **Doctrine of notice.** The duty of investigating a title rests mainly upon that peculiar feature of law to which the term "notice" has been applied. The title of a purchaser for value cannot ordinarily be impeached, unless he has had notice of the infirmity which goes to defeat it; but this notice does not necessarily mean "knowledge," and although the purchaser may have been innocently ignorant in fact, and from a moral point of view, he may, nevertheless, be legally chargeable with knowledge derived from notice. Notice may, of course, be actual; and in such case knowledge is a necessary resultant; or, it may be constructive, which is the legal equivalent of

[2] Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519.

[3] Abbott v. Allen, 2 Johns. Ch. 519; Upton v. Tribilcock, 1 Otto (U. S.), 45

actual notice, and although the person sought to be affected thereby may have had no notice in fact, he may yet be so situated that he is estopped to aver this or to deny that he did not have notice.

Notice is further classified by the elementary writers as express and implied — the latter term being used where notice is imputed to a party shown to be conscious of having means of knowledge which he does not use, as where he chooses to remain voluntarily ignorant, or is grossly negligent in not pursuing inquiries suggested by known facts.[4]

The terms "implied" and "constructive" notice are frequently used as synonymous, yet there seems to be a marked distinction between them. The former, as previously remarked, is an imputation arising from an inference of fact; while the latter, being the creature of positive law, rests upon strict legal inference. Indeed, we may with propriety say that it is a rule rather than a presumption.

There is some conflict among writers, and in the decided cases, as to what constitutes actual notice, although it has been said that much of the difference is verbal only—more apparent than real; and the general propositions which directly affect the question are, in the main, well agreed upon. It does not necessarily mean personal information or conscious knowledge, and may rest in inference. It may be proved by direct evidence or it may be inferred or implied from indirect evidence—circumstances—and is a conclusion of fact, capable of being established by all grades of legitimate evidence.[5]

The doctrine of actual notice implied by circumstances necessarily involves the rule that a purchaser, before buying, should clear up the doubts which apparently hang upon the title by making due inquiry and investigation. If a party has

[4] Knapp v. Bailey, 79 Me. 195; Hovey v. Blanchard, 13 N. H. 145; Williamson v. Brown, 15 N. Y. 354; Curtis v. Mundy, 3 Met. (Mass.) 405; Hoppin v. Doty, 25 Wis. 573; Eck v. Hatcher, 58 Mo. 235; Carter v. Hawkins, 62 Tex. 393; Hoy v. Bramhall, 19 N. J. Eq. 563.

[5] Blatchley v. Osborne, 33 Conn. 226; Buck v. Paine, 50 Miss. 648; Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 480; Maupin v. Emmons, 47 Mo. 306; Maul v. Rider, 59 Pa. St. 171; Kirsh v. Tozier, 143 N. Y. 390; Jennings v. Ford, 118 Mo. 296; Mercantile Nat. Bank v. Parsons, 54 Minn. 56.

knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained; he has no right to shut his eyes against the light before him, nor to disregard the signals seen by him; and if he does so it may be well concluded that he is avoiding notice of that which he in reality believes or knows.[6] Hence, it is said, actual notice of facts which to the mind of a prudent man indicate notice is proof of notice.[7]

The same facts may sometimes be such as to prove both actual and constructive notice; that is, a court might infer constructive notice and a jury actual notice from the facts, while on the other hand there may be cases where the facts show actual notice when they do not warrant the inference of constructive notice.[8]

It may be stated as a general rule, however, that one claiming title to land by a deed purporting to be made for a valuable consideration is presumed to be a purchaser in good faith without notice, and while the fact of notice may be inferred from circumstances as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser and fix upon him the imputation of bad faith, while the burden of proof ordinarily will rest upon the party attacking the transaction.[9]

Every species of notice is ineffectual as a restraint on existing rights, and can only operate on those rights which are subsequently acquired.

§ 261. **Constructive notice.** The law of notice derives whatever of subtilty or intricacy it may possess from that part technically known as constructive notice, which is not notice

[6] See Lamb v. Pierce, 113 Mass. 72; Williamson v. Brown, 15 N. Y. 354; Rogers v. Jones, 8 N. H. 264; Bartlett v. Glasscock, 4 Mo. 62; Blatchley v. Osborn, 33 Conn. 226.

[7] 3 Wash. Real Prop. 335.

[8] As where a deed, which by reason of inherent defects or irregularity of recording, fails to impart constructive notice, is yet seen upon the records by a purchaser who thereby receives actual notice. Hastings v. Cutler, 24 N. H. 481.

[9] See Anthony v. Wheeler, 130 Ill. 128; Coleman v. Barklew, 27 N. J. L. 357; Vest v. Michie, 31 Gratt. (Va.) 149; Hiller v. Jones, 66 Miss. 636.

at all, but rather a legal inference from established facts;[10] and while courts and writers have at different times made general statements calculated to outline its character, no very clear exposition of its real nature has ever been made; nor has any writer been able to formulate any precise rule as to what does or does not constitute constructive notice, because unquestionably that which may not affect one man may be abundantly sufficient to affect another; and so, as Mr. Sugden observes, "every one who has attempted to define what it is has declared his inability to satisfy even himself."[11] The test generally applied by American courts has been whether the facts are sufficient to put a prudent man on inquiry, and whether an inquiry has been prosecuted with reasonable care and diligence;[12] for whatever is sufficient to put a party upon inquiry which would lead to the truth is, in all respects, equal to and must be regarded as notice; and if a purchaser acts in bad faith and wilfully or negligently shuts his eyes against those lights which, with proper observation, would lead him to a knowledge of facts affecting the subject of his purchase, he will be held to have notice of such facts.[13]

A purchaser is constructively charged with notice of everything that appears on the face of the deeds constituting his chain of title;[14] but he is not bound to inquire into collateral

[10] Birdsall v. Russell, 29 N. Y. 220.

[11] 2 Sugd. Vend. 570.

[12] Hull v. Noble, 40 Me. 459; Littleton v. Giddings, 47 Tex. 109; Helms v. Chadbourne, 45 Mo. 60; Warren v. Swett, 31 N. H. 332; Allen v. Poole, 54 Miss. 323; Briggs v. Taylor, 28 Vt. 180; Blanchard v. Ware, 43 Iowa, 530; Brown v. Volkening, 64 N. Y. 76; Edwards v. Thompson, 71 N. C. 177; Pell v. McElroy, 36 Cal. 268.

[13] Chicago, etc. R. R. v. Kennedy, 70 Ill. 350; Barnard v. Campau, 29 Mich. 162; Littleton v. Giddings, 47 Tex. 109; Cunningham v. Pattee, 99 Mass. 248.

[14] Morrison v. Morrison, 38 Iowa, 73; Burch v. Carter, 44 Ala. 115. Thus, a purchaser from one of two joint owners is chargeable with notice of the interest of the other, as shown by the conveyance to his vendor. Campbell v. Roach, 45 Ala. 667. But where two persons hold undivided interests in the same parcel of land by separate deeds, of different dates and from different grantors, a person dealing in good faith with one of them in reference to his interest is not bound with notice that the property is partnership property from the knowledge merely that the holders thereof are partners, and make use of the premises for partnership purposes, where nothing on the record indicates a partnership holding. Reynolds v. Ruckman, 35 Mich. 80.

circumstances.[15] So, also, he must take notice of the contents of a deed referred to in the conveyance under which he holds;[16] yet this rule does not require him to take notice of a fact exhibited in the deed which is wholly foreign to the subject of the reference.[17] Further, it is a general rule that a purchaser is constructively charged with notice of all facts exposed upon the public records which directly affect or lie in the line of the title he is receiving.

The general rule that a purchaser of land is chargeable with constructive notice of all duly-recorded conveyances of such land executed by his grantor, applies to equitable as well as to legal estates.[18]

§ 262. **When purchaser is chargeable with notice.** It is difficult if not impossible to lay down any general rule as to what facts will in every case be sufficient to charge a party with notice or put him on inquiry. It may be said, however, that a purchaser buying real property, of the title to which there must be evidence in writing, is chargeable with notice of any infirmity of his title which the writing discloses.[19] If he has notice of a prior claim, or equity, or of facts, which if followed up would discover the truth, he is put under a duty to make the investigation; and, if he fails to do so, he is chargeable with knowledge which the inquiry would have disclosed.[20] So, also, a purchaser *pendente lite* is bound by the result of the suit, and chargeable with notice of every fact pertaining thereto.[21] The purchaser of land from a vendor in

[15] Burch v. Carter, 44 Ala. 115.

[16] Morrison v. Morrison, 38 Iowa, 73; Deason v. Taylor, 53 Miss. 697.

[17] Thus, it does not require him to take notice that the deed has incorporated in it a bill of sale of personalty in which a lien is attempted to be retained by the grantor. Mueller v. Engelin, 12 Bush (Ky.), 441.

[18] Digman v. McCollum, 47 Mo. 372. A purchaser of a large tract of land for a valuable consideration, *held* chargeable with notice of an equitable title under a trust created by a decree in chancery, he having made no inquiries of the vendor or any other person about the title, nor called for an inspection of the title deeds or an abstract thereof, but relied on the possession of the vendors, and their assertion of title and the warranty clause contained in the deed of conveyance. Witter v. Dudley, 42 Ala. 616.

[19] Corbitt v. Clenny, 52 Ala. 480; Stidham v. Matthews, 29 Ark. 650.

[20] Buck v. Paine, 50 Miss. 648; Carter v. Portland, 4 Oreg. 339; Finch v. Beal, 68 Ga. 594; Brinkman v. Jones, 44 Wis. 498.

[21] Holman v. Patterson, 29 Ark. 357; Kern v. Hazlerigg, 11 Ind.

possession who claims it as his own, but who has no legal title except as trustee for another, is chargeable with notice of the trust;[22] and generally a purchaser is held affected with notice of all that is patent on an examination of the premises he is about to buy.[23]

The possession of land by a person at the time of his death is *prima facie* evidence of ownership at that time, and a subsequent purchaser of the legal title will be conclusively presumed to know that whatever rights such deceased person had in the land, not disposed of by will and of an inheritable character, devolved on his heirs; and his possession being constructive notice of his rights at the time of his death, it becomes the duty of such purchaser to inquire of his heirs and ascertain the extent of that interest.[24]

§ 263. **What notice sufficient.** Whatever fairly puts a party on inquiry is regarded as sufficient notice where the means of knowledge are at hand;[25] and a purchaser, whenever he has sufficient knowledge to put him on inquiry, or where he has been informed of circumstances which ought to have led to such inquiry, is deemed to have been sufficiently notified to deprive him of the character of an innocent purchaser.[26] It is the duty of every person who may have knowledge or infor-

443; Turner v. Babb, 60 Mo. 342; Cooley v. Brayton, 16 Iowa, 10.

[22] Jones v. Shaddock, 41 Ala. 362; Smith v. Walter, 49 Mo. 250; Ryan v. Doyle, 31 Iowa, 53. But if a mere want of caution in making the purchase, as distinguished from fraudulent and wilful blindness, is all that can be imputed to him, he will not be regarded as a trustee *in invitum* so as to charge him with the rents and profits of the land. Dudley v. Witter, 46 Ala. 664.

[23] This principle finds many illustrations. The agent of a party claiming title to real estate in Chicago put upon the premises a board on which was printed "For sale by S. H. Kerfoot & Co., 48 Clark St." Kerfoot & Co. were the agents of the party claiming title. *Held*, that a creditor whose judgment lien attached while this notice was posted upon the premises was thereby notified of the interest of the party claiming title, since upon inquiry of the agents he could have ascertained the extent and character of the title, and could not therefore be considered a *bona fide* purchaser. Hatch v. Bigelow, 39 Ill. 546.

[24] McVey v. McQuality, 97 Ill. 93.

[25] Booth v. Barnum, 9 Conn. 286; Wright v. Ross, 36 Cal. 437; Nute v. Nute, 41 N. H. 60; Stevens v. Goodenough, 26 Vt. 676; Williamson v. Brown, 15 N. Y. 354; Parker v. Foy, 43 Miss. 260.

[26] Pendleton v. Fay, 2 Paige (N. Y.), 202; Price v. McDonald, 1 Md. 415; Centre v. Bank, 22 Ala. 743; Ringgold v. Waggoner, 14 Ark. 69;

mation of facts sufficient to put a prudent man on inquiry, as to the existence of some right or title in conflict with that he is about to purchase, to prosecute the same, and to ascertain the extent of such prior right; and if he wholly neglects to make the inquiry, or, having begun it, fails to prosecute it in a reasonable manner, the law will charge him with knowledge of all facts that such inquiry would have afforded.[27] A purchaser is bound to take notice of all recitals in the deed through which the title is derived,[28] and is affected with notice of every matter or thing stated in the several conveyances constituting his chain of title.[29] All such statements and recitals are sufficient to raise an inquiry, and the corresponding duty is thrust upon the purchaser to investigate and fully explore everything to which his attention is thereby directed.[30]

Notice, to bind a purchaser, need not consist of positive information, for any fact that would put an ordinarily prudent man on inquiry will suffice;[31] nor is it essential that notice of an equitable interest should come from the interested party or his agent, for such notice may be imparted *aliunde,* provided it is of a character likely to gain credit.[32] Vague rumors or mere surmises are insufficient in themselves; but where parties assume to speak from knowledge, and particularly when such parties stand in situations which may reasonably

Shepardson v. Stevens, 71 Ill. 646; Brown v. Valkening, 64 N. Y. 76; McLeod v. Bank, 42 Miss. 99; Shatwell v. Harrison, 30 Mich. 179.

[27] Blaisdell v. Stevens, 16 Vt. 179; Spofford v. Weston, 29 Me. 140; Blatchley v. Osborn, 33 Conn. 226; Warren v. Sweet, 31 N. H. 332; Hoy v. Bramhall, 19 N. J. Eq. 563; McGee v. Gindrat, 20 Ala. 95; Brinkman v. Jones, 44 Wis. 498; Erickson v. Rafferty, 79 Ill. 209.

[28] Deason v. Taylor, 53 Miss. 697.

[29] Burch v. Carter, 44 Ala. 115.

[30] Thus, if the deed recites that the sale is made on a credit, a subsequent purchaser is bound to inquire whether the purchase money has been paid. That the time for the payment of the purchase money, as stated in the deed, has elapsed does not authorize him to presume that it was paid. Deason v. Taylor, 53 Miss. 697; and see Morrison v. Morrison, 38 Iowa, 73.

[31] Meier v. Blume, 80 Mo. 179.

[32] As, where a party about to purchase land from a widow, the legal title of which was in her, was informed by the grandfather of her minor children that the equitable title had been in the deceased husband and was then in his heirs, *held,* that the notice came from a proper person. Butcher v. Yocum, 61 Pa. St. 168.

be presumed to afford them the means of knowledge, the purchaser cannot disregard the information so obtained.[33]

While no person is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, and then claim protection as an innocent purchaser, yet it would seem that he is not necessarily affected with notice of a prior adverse equity received from a stranger to the transactions, or person not interested in the property;[34] nor will vague reports, mere rumors or hearsay concerning such equity, and communicated by such person, be sufficient to put him on inquiry and charge him with knowledge of the facts that he might thereby have learned.[35] So, also, a mere statement by a third person that the title was void will not in itself charge the buyer with notice of facts not stated;[36] and generally, if the information be of an indefinite character, and does not in any manner indicate the means by which the truth of the matter can be ascertained, such information will not amount to notice, either actual or constructive.[37]

It has been held, however, that where a party has heard of a sale of land before he purchased, and from a source entitled to reasonable credit, and under circumstances not likely to be forgotten, a duty would devolve upon him of tracing out the matter and ascertaining its truth.[38]

§ 264. What will put a party on inquiry. As to what will be a sufficiency of facts to excite inquiry no positive rule can very well be established, as each case depends largely upon its

[33] Curtis v. Mundy, 3 Met. (Mass.) 405; Butcher v. Yocum, 61 Pa. St. 168; Lawton v. Gordon, 37 Cal. 202. In this case the purchaser was notified by the recording officer that a deed had been filed with him and then withdrawn.

[34] Parkhurst v. Hosford, 10 Sawyer (C. Ct.), 401; Flagg v. Mann, 2 Sumn. (C. Ct.) 486; Butler v. Stevens, 26 Me. 484; Woodworth v. Paige, 5 Ohio St. 70.

[35] Ratteree v. Conley, 74 Ga. 153; Flagg v. Mann, 2 Sumn. (C. Ct.) 486; Hottenstein v. Lerch, 104 Pa. St. 454.

[36] Ratteree v. Conley, 74 Ga. 153; Hall v. Livingstone, 3 Del. Ch. 348.

[37] As where a stranger to the title, while the person proposing to purchase is searching the records for information, tells him there is something wrong about the title, but gives no names or other facts pointing out a course of inquiry. Slattery v. Rafferty, 93 Ill. 277; and see Lamont v. Stimson, 5 Wis. 443; Mulliken v. Graham, 72 Pa. St. 484.

[38] Cox v. Milner, 23 Ill. 476.

own facts and attendant circumstances. Indeed, there is a great inconsistency in the cases on this point. In general, a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry, suggested by such information prosecuted with diligence, would have disclosed to him.[39] Thus, when a purchaser has notice of a deed affecting the property to be purchased, this is sufficient to put him on inquiry, and he is presumed to have notice of the contents of that deed and of all other deeds to which it refers.[40]

Possession of land by one whose deed is not registered is notice of his title, whatever such title may be worth, and is sufficient to put a subsequent purchaser on inquiry.[41] So, also, the possession of a tenant is sufficient notice of his landlord's title to put a person dealing with the property on inquiry;[42] and the law will charge such person with notice of all the facts which he might have ascertained by using proper diligence in inquiring.[43] So, also, where a tenant in possession agrees to purchase the premises his possession amounts to notice of his equitable title to a subsequent grantee of his landlord.[44] Possession of land under an unrecorded agreement with the owner to purchase the same is notice sufficient to put others on inquiry, and if they buy of the owner the contract of purchase may be enforced against them in equity.[45]

It has been held that a purchaser is charged with notice that his grantor held by what equity must declare to be an

[39] Wilson v. Hunter, 30 Ind. 466. One who "knew by report" when he purchased land that there was a mortgage upon it is chargeable with notice of such mortgage if a valid one, although the report also stated that such mortgage was void. Pringle v. Dunn, 37 Wis. 449. A purchaser who at the time of sale is in possession of facts which would put an ordinarily prudent man upon inquiry, as to the existence of vendor's lien upon the property purchased, will be held to take subject to the lien. Major v. Bukley, 51 Mo. 227; and see Clark v. Fuller, 39 Conn. 238.

[40] Green v. Early, 39 Md. 223.

[41] Warren v. Richmond, 53 Ill. 52; Perkins v. Swank, 43 Miss. 349; Galley v. Ward, 60 N. H. 331; Phillips v. Costley, 40 Ala. 486; Sears v. Munson, 23 Iowa, 380.

[42] Edwards v. Thompson, 71 N. C. 177; Cunningham v. Pattee, 99 Mass. 248; Kerr v. Day, 14 Pa. St. 112; Conlee v. McDowell, 15 Neb. 184.

[43] O'Rourke v. O'Conner, 39 Cal. 442; Dickey v. Lyon, 19 Iowa, 544.

[44] Coari v. Olsen, 91 Ill. 273.

[45] Moss v. Atkinson, 44 Cal. 317; Strickland v. Kirk, 51 Miss. 795; but see Rogers v. Hussey, 36 Iowa, 664.

invalid deed, when such grantor was out of and never had been in possession, and others had controlled the property in many ways for years, and when an examination of the registry of deeds would have shown conveyances inconsistent with the full validity of the deed under which the grantor claimed. That under such circumstances the duty of inquiry is imperative, and the facts sufficient to put a prudent man on his guard. And so it is, perhaps, in nearly every case where the vendee purchases on the basis of a merely nominal title.[46]

Mere rumors are not notice, nor do they impose upon a purchaser the duty of inquiry.[47] To affect him the information should come from some one interested in the estate, or from some authoritative source,[48] and should be of such a character as to impress a prudent person with the duty of further investigation.[49] To set on foot an inquiry into the foundation of mere rumors would, in most cases, be a vain and impracticable pursuit;[50] and unless there is some act or declaration from an authentic source, the purchaser will not be held to the duty of inquiry, nor will he be chargeable with dereliction in this respect because he has failed so to do.[51]

§ 265. **Notice from registration.** In the United States it has been uniformly held that the record of a conveyance, executed in conformity to law, operates as constructive notice to all subsequent purchasers and incumbrancers claiming under the same grantor of any estate, either legal or equitable,[52] in the same property, provided the conveyance be one which the law requires or authorizes to be recorded.[53]

The doctrine of constructive notice under registration laws

[46] Knapp v. Bailey, 79 Me. 195.

[47] Churcher v. Guernsey, 39 Pa. St. 86; Hottenstein v. Lerch, 104 Pa. St. 460; Hall v. Livingstone, 3 Del. Ch. 348; Shepard v. Shepard, 36 Mich. 173; Butler v. Stevens, 26 Me. 484.

[48] Satterfield v. Malone, 35 Fed. Rep. 445; Mulliken v. Graham, 72 Pa. St. 484.

[49] Chicago v. Witt, 75 Ill. 211.

[50] Maul v. Rider, 59 Pa. St. 167.

[51] See Curtis v. Mundy, 3 Met. (Mass.) 405; Rogers v. Hoskins, 14 Ga. 166; Van Duyne v. Vreeland, 12 N. J. Eq. 142.

[52] The earlier cases held that the recording acts did not contemplate conveyances of equitable rights or interests, and consequently that record of such a conveyance would not be notice; but this position has long been abandoned.

[53] Tilton v. Hunter, 29 Me. 29; Crockett v. McGuire, 10 Mo. 34; Meni v. Rathbone, 21 Ind. 454; Irvin v. Smith, 17 Ohio, 226; Mallory v. Stodder, 6 Ala. 801.

has, however, always been regarded as a harsh necessity, and the statutes which create it have always been subjected to the most rigid construction.[54] Hence only the facts as they appear on the face of the record are deemed binding on subsequent purchasers; and if from any cause the real facts are there misstated—as if the wrong land is by mistake described, or the sum for which a mortgage is given is omitted or incorrectly recorded—a subsequent purchaser in good faith, relying upon what is shown, will not be affected by the error or omission.[55] There is a line of cases in apparent conflict with this doctrine, so far at least as respects errors occurring in transcription and occasioned by the neglect of the recording officer;[56] but the general doctrine is as first stated.

Again, the old doctrine that the record of a deed is constructive notice to all the world has been expressly denied in recent cases, and the rule has been laid down that such record is constructive notice only to those who are bound to search for it—as subsequent purchasers and incumbrancers, or others who deal with or on the credit of the title in the line of which the recorded deed belongs.[57] But strangers to the title are in no way affected by the record.[58]

§ 266. **Recitals in deeds.** The recitals of a deed in the chain of title are such notice to a purchaser as would put him on inquiry as to the nature and extent of the matters referred to in the recitals,[59] and all persons dealing with the property are bound at their peril to take notice of the facts as stated;[60]

[54] Chamberlain v. Bell, 7 Cal. 292.

[55] Sanger v. Craigul, 10 Vt. 555; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288; Chamberlain v. Bell, 7 Cal. 292; Terrell v. Andrew County, 44 Mo. 309; Pringle v. Dunn, 37 Wis. 465; Barnard v. Campau, 29 Mich. 164; Miller v. Bradford, 12 Iowa, 14; Peck v. Mallams, 10 N. Y. 519; Dean v. Anderson, 34 N. J. Eq. 508.

[56] See *infra*, "Registration," where the subject is discussed and the authorities on either side collated.

[57] Maul v. Rider, 59 Pa. St. 167; Straight v. Harris, 14 Wis. 509; Birnie v. Main, 29 Ark. 591; Iglehart v. Crane, 42 Ill. 261; McCabe v. Grey, 20 Cal. 509; Hoy v. Bramhall, 19 N. J. Eq. 563.

[58] Maul v. Rider, 59 Pa. St. 167.

[59] Chicago, etc. R. R. Co. v. Kennedy, 70 Ill. 350; Deason v. Taylor, 53 Miss. 697; Morrison v. Morrison, 38 Iowa, 73.

[60] Ætna Ins. Co. v. Corn, 89 Ill. 170; White v. Kibby, 42 Ill. 510. Technically speaking, a recital of one deed in another operates as an estoppel and binds parties and

but the recitals in a deed of a fact which may or may not, according to circumstances, amount to fraud, will not affect a purchaser for a valuable consideration denying actual notice of the fraud; nor will circumstances amounting to mere suspicion be deemed notice.[61]

Again, while the rule that if a purchaser of land has knowledge of any facts sufficient to put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some rights or title in conflict with that he is about to purchase, the law presumes he made the inquiry and will charge him with the notice he would have received if he had made it, applies with particular force to statements and recitals in deeds, yet such rule does not require anything more than ordinary prudence and diligence on the part of the purchaser, and cannot be extended by implication to charge facts not stated or afford constructive notice of matters entirely disconnected with the subject of the recitals.[62]

§ 267. **Inquiries in pais.** As previously remarked, a purchaser is bound to exercise due diligence in the prosecution of all inquiries that may be suggested by any fact brought to his knowledge, and in the discharge of such duty must make inquiries *in pais* as well as examine records.[63] Thus, one who has notice of a prior unrecorded deed is not at liberty to rely, without further inquiry, upon a search of the records, and the fact that no such deed is found recorded; and one who pur-

privies. But it does not bind strangers who claim by title paramount to the deed, or persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed. Carver v. Astor, 4 Pet. (U. S.) 1; Crane v. Morris, 6 Pet. (U. S.) 598.

[61] Munn v. Burgess, 70 Ill. 604.

[62] Thus, where the vendor's deed refers to an incumbrance upon the land, the fact that the incumbrance described was discharged upon the record prior to the execution of such deed is not sufficient to charge a purchaser with constructive notice of the existence of another and entirely different lien which nowhere appears of record as a charge upon the premises; although the reference in the deed was, by mistake, to the incumbrance previously discharged, instead of to the one subsisting at the execution of the deed. Cambridge Bank v. Delano, 48 N. Y. 326; and see Muller v. Engelin, 12 Bush (Ky.), 441.

[63] Russell v. Sweezey, 22 Mich. 235; Pringle v. Dunn, 37 Wis. 449; Littleton v. Giddings, 47 Tex. 109.

chases with such notice and upon such search is not entitled to be considered a *bona fide* purchaser.[64]

§ 268. **Notice of unrecorded instruments.** The rule is that whatever is sufficient to put a purchaser upon inquiry is good notice of all facts which the inquiry would have disclosed. Hence, where a purchaser of land is in the possession of certain knowledge or information calculated to induce inquiry he will be held to a high degree of care in making his investigation of title, and be charged with constructive notice of the facts which he might have ascertained. Thus, if he knows at the time of his purchase that another person has for years claimed the land and paid taxes thereon, it is his duty before making his purchase to go to such claimant and ascertain from him what title he has; and if he fails to make such inquiry the rule as first stated applies, and he will hold subject to the equitable rights of the claimant under an unrecorded instrument.[65]

An unrecorded deed is as effective to transfer title as though recorded, and subsequent purchasers who take with notice hold in subordination thereto.[66]

§ 269. **Notice of parol agreements.** Actual possession of land under a parol agreement for purchase is notice to all persons dealing with it of whatever rights the possessor has in it; and a person buying the same from the holder of the legal title will be treated the same as his grantor, and be subject to the same duties and burdens.[67] But this rule only applies where there is a visible, open and exclusive possession coupled with the other incidents; and actual notice of a prior parol agreement to sell, where the first purchaser is not in possession under his contract, amounts to nothing, as the subsequent sale and conveyance is a repudiation of the prior contract under the statute of frauds, and renders the prior sale void.[68]

§ 270. **Notice of fraud.** A purchaser of land will be presumed to have examined the title; and if there was anything

[64] Shotwell v. Harrison, 30 Mich. 179.

[65] Redden v. Miller, 95 Ill. 336.

[66] Maupin v. Emmons, 47 Mo. 304; Finch v. Beal, 68 Ga. 594; Brinkman v. Jones, 44 Wis. 498; Lawton v. Gordon, 37 Cal. 202; Wilson v. Hunter, 30 Ind. 466; Lamb v. Pierce, 113 Mass. 72.

[67] Webber v. Curtiss, 104 Ill. 309; Bartling v. Brasuhn, 102 Ill. 441.

[68] Pickerell v. Morss, 97 Ill. 220.

in any link of the chain of title showing fraud, or such circumstances as would put a prudent man on inquiry for fraud, he will be charged with notice of fraud if any existed.[69]

§ 271. Possession as an evidence of title. Every purchaser of land is charged with the duty of exercising diligence in making proper examinations touching the rights and equities of others in respect thereto, and must be presumed to investigate the title not only as it may be shown of record, but by inquiries *in pais* as well.[70] Actual possession, and the use and occupation of land, furnishes notice sufficient to put all intending purchasers on inquiry as to the rights or claims of the possessor thereof;[71] and when the location is such as to render personal application to and inquiry of the occupant practicable, a purchaser failing to do so is no more entitled to be regarded as a purchaser in good faith than if he had inquired and ascertained the real facts in the case.[72] Yet the protection which the registry law gives to those taking titles or security upon land upon the faith of the records should not be destroyed or lost, except upon clear evidence showing want of good faith in the party claiming their protection, and a clear equity in him who seeks to establish a right in hostility to the record title. Slight circumstances or mere conjecture should not suffice to overthrow the title of one who buys with reliance upon the record title; and to effect such a result there should be ample proof of prior title or prior equities or circumstances tending to prove such prior

[69] Hunter v. Stoneburner, 92 Ill. 75; but see Munn v. Burgess, 70 Ill. 604.

[70] Littleton v. Giddings, 47 Tex. 109; Russell v. Sweezy, 22 Mich. 235; Warren v. Richmond, 53 Ill. 52.

[71] Greer v. Higgins, 20 Kan. 420; Mechan v. Williams, 48 Pa. St. 241; Cabeen v. Buckenridge, 48 Ill. 91; Hommel v. Devinney, 39 Mich. 522; Hawley v. Morse, 32 Mo. 287; Pinney v. Fellows, 15 Vt. 525; Perkins v. Swank, 43 Miss. 349; Galley v. Ward, 60 N. H. 331; Phillips v. Castly, 40 Ala. 486; Sears v. Munson, 23 Iowa, 380; Cox v. Prater, 67 Ga. 588; Massey v. Hubbard, 18 Fla. 688; Killey v. Wilson, 33 Cal. 690; Tankard v. Tankard, 79 N. C. 54; Glidewell v. Spaugh, 26 Ind. 319; Westbrook v. Gleason, 79 N. Y. 23; Groff v. Ramsey, 19 Minn. 44.

[72] Pell v. McElroy, 36 Cal. 272; Williamson v. Brown, 15 N. Y. 355; Moyer v. Hinman, 13 N. Y. 189; Buck v. Holloway, 2 J. J. Marsh. (Ky.) 180; McKee v. Wilcox, 11 Mich. 358; Lipp v. Land Syndicate, 24 Neb. 692. Yet while the open and actual possession of

rights, which affect the conscience of the subsequent purchaser. Actual notice of itself impeaches the subsequent conveyance, while proof of circumstances, short of actual notice, which should put a prudent man upon inquiry will authorize an inference of notice sufficient to rebut any presumption of good faith.[73]

With respect to the character of possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those having a title of record, it is well established by an unbroken current of authority that such possession and occupation must be actual, open and visible; it must not be equivocal, occasional or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner of record.[74] All the cases agree that notice will not be imputed to a purchaser except where it is a reasonable and just inference from visible facts; and these can only exist where there is an exclusive possession, actual and distinct, and manifested by such acts of ownership as would naturally be observed and known by others.[75]

In conformity to the foregoing principles the doctrine of constructive notice will not apply to unimproved lands;[76] nor to cases where the possession is ambiguous or liable to be

land affords public notice of the occupant's claim, one who on inquiring of the occupant receives no information from him is not ordinarily chargeable with notice of his equities. Cavin v. Middleton, 63 Iowa, 618.

[73] Chapman v. Chapman, 91 Va. 397.

[74] Brown v. Volkening, 64 N. Y. 76; Norcross v. Widgerly, 2 Mass. 508; Colby v. Kenniston, 4 N. H. 262; Sanford v. Weeks, 38 Kan. 319; Lindley v. Martindale, 78 Iowa, 380; Townsend v. Little, 109 U. S. 504. Thus, the possession of a farm by a woman claiming title under an unrecorded deed from her son-in-law is insufficient to impart notice of title thereto when the grantor, residing on the farm when the conveyance was made, continues so to do and to exercise some authority over it. Elliot v. Lane, 82 Iowa, 484.

[75] Brown v. Volkening, 64 N. Y. 76; Patten v. Moore, 32 N. H. 382. The possession of land, to afford notice of the party's rights, must be as open, notorious and exclusive as is required to constitute adverse possession under the limitation laws; but it is not necessary that it should have all the characteristics of an adverse possession. Smith v. Heirs of Jackson, 79 Ill. 254.

[76] White v. Fuller, 38 Vt. 201.

misunderstood;[77] nor to an uninhabited or unfinished dwelling-house;[78] and it has been held that the use of lands for pasturage or for cutting of timber is not such an occupancy as will charge a purchaser or incumbrancer with notice.[79] The general rule is that, when land is vacant or unoccupied, no presumption can arise against the legal title.[80]

There are a few cases which seem to hold strongly against the doctrine of constructive notice arising from possession merely,[81] though admitting such to be competent for the consideration of a jury in connection with direct evidence of actual notice; but the great preponderance of authority sustains the principle that a purchaser from the record owner is bound to notice the possession of another, and takes subject to the right indicated by such possession.

In every instance, therefore, where the vendor is not in possession, the safe course is to make the inquiry, for the law will not extend its protection to those who through negligence or inattention suffer an advantage to be taken of them; and while a purchaser of land who examines the records is protected by them so far as they can protect him, yet he necessarily takes the risk of having the actual state of the title correspond with that which appears of record.[82] The importance of the inquiry cannot be overestimated in those cases where a long interval exists between the time of acquiring title and its offer to the purchaser. In some cases seven years,

[77] Patton v. Moore, 32 N. H. 382; Loughbridge v. Borland, 52 Miss. 546; Elliot v. Lane, 82 Iowa, 484. Actual residence on land is the best notice to adverse claimants that the land is being held and used by the occupant as his own. Martin v. Judd, 81 Ill. 488. But facts indicative of a claim of ownership may be considered with other circumstances where there is no actual residence: thus, the fact that the party claiming title had laid a sidewalk is one proper to be considered in connection with other marks of ownership. Hatch v. Bigelow, 39 Ill. 546.

[78] Brown v. Volkening, 64 N. Y. 76.

[79] McMechan v. Griffing, 3 Pick. (Mass.) 149; Holmes v. Stout, 10 N. J. Eq. 419; and see Fassett v. Smith, 23 N. Y. 252; Thompson v. Burhans, 79 N. Y. 93.

[80] White v. Fuller, 38 Vt. 201. The person having the legal title is always in law in the constructive possession of the land, unless he has become disseized. Thompson v. Burhans, 79 N. Y. 93.

[81] Pomeroy v. Stevens, 11 Met. (Mass.) 244; Glass v. Hurlbut, 102 Mass. 34; Clark v. Bosworth, 51 Me. 528.

[82] Peck v. Clapp, 98 Pa. St. 581.

and in all cases twenty years, will be sufficient to bar an apparent title of record when adverse rights have been acquired by proper legal methods; and continuous possession is almost as essential a showing as unbroken continuity of record title.

§ 272. **Continued—Character of possessor.** Possession by a tenant is notice of the title of the landlord[83] as well as of the actual interest of the tenant and the whole extent thereof;[84] so, too, actual possession by a beneficiary is notice of the trust,[85] and under the first mentioned doctrine that possession by a tenant is notice of the rights of the landlord, a grantee of lands then in the actual and visible possession of a tenant of a beneficiary, will take with constructive notice of the right and title of such beneficiary, and of the contingent right of dower of his wife.[86]

§ 273. **Continued—Possession of prior vendors.** It has been held that the rule which provides that possession of land is notice to a purchaser of the possessor's title does not apply to a vendor remaining in possession so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed, and that, so far as the purchaser is concerned, the vendor's deed is conclusive on that subject.[87] So, too, it has further been held that the continued use and occupation by a grantor of lands which he had previously conveyed is not evidence that his possession is adverse to his grantee; on the contrary, his possession is deemed to be under and in subordination to the legal title held by his grantee, and that he is estopped by his deed from claiming that his holding is adverse, and that this rule applies to all subsequent grantees of such grantor.[88]

Undoubtedly the general rule is that the possession of a grantor is not adverse to his grantee, and that the grantor and

[83] Dickey v. Lyon, 19 Iowa, 545.

[84] Chesterman v. Gardner, 5 Johns. (N. Y.) 29.

[85] Pritchard v. Brown, 4 N. H. 397.

[86] Bowman v. Anderson, 82 Iowa, 219.

[87] Van Kuren v. R. R. Co. 38 N. J. L. 165; and see Abbott v. Gregory, 29 Mich. 68; Bloomer v. Henderson, 8 Mich. 395; Newhall v. Pierce, 5 Pick. (Mass.) 450; Hafter v. Strange, 65 Miss. 323; Cook v. Travis, 20 N. Y. 400; May v. Sturdivant, 75 Iowa, 116.

[88] Schwallback v. R. R. Co. 69 Wis. 292.

all claiming under him by a title acquired subsequent to the grant are estopped from denying the grantee's title. Yet this is a most unsafe rule for intending purchasers to rely upon, for many circumstances may intervene to prevent its application. In a number of instances grantors who had conveyed by quitclaim deed only by remaining in possession of the property and asserting a hostile claim have been permitted to acquire a title against their grantees by virtue of the statute of limitations;[89] while some courts have held that a grantor with warranty may, subsequent to the delivery of his grant, originate an adverse possession, and it is not estopped from asserting the same by the covenant of warranty.[90] So, too, equitable circumstances may prevent the operation of the rule, as where a deed had been delivered in escrow until the price should have been paid by the grantee was put on record in violation of the agreement, it was held that the possession of the grantor was constructive notice to a subsequent purchaser from his grantee of all his rights and equities in the land.[91] In any event it would seem that possession of a prior vendor cannot with safety be ignored, even though he may have conveyed with warranty; and where he continues to occupy the premises the better-sustained rule would seem to be that all persons acquiring title from his grantee are charged with notice of the claim of the grantor and of his equitable rights.[92]

This is in consonance with the established doctrine which allows possession to have the effect of notice, and the cases which declare the rule last stated proceed on the ground that there is no good reason for making a distinction between possession by a stranger to the record title and possession by a grantor after the delivery of his deed. In either case, it is contended, the possession is a fact inconsistent with the title as shown of record, and if possession by a stranger is sufficient to make it obligatory upon a purchaser to ascertain his right, possession by a grantor is a circumstance entitled to equal

[89] Dorland v. Magilton, 47 Cal. 485.

[90] Sherman v. Kane, 86 N. Y. 57.

[91] Bank v. Godfrey, 23 Ill. 579.

[92] White v. White, 89 Ill. 460; Ford v. Marcall, 107 Ill. 136; Pell v. McElroy, 36 Cal. 268; Webster v. Maddox, 6 Me. 256; Wright v. Bates, 13 Vt. 341; McKecknie v. Hoskins, 23 Me. 230; Hopkins v. Garrard, 7 B. Mon. (Ky.) 312; Eylar v. Eylar, 60 Tex. 315.

consideration.[93] It is said, that as an absolute deed not only divests title but also transfers the right of possession, so a grantor found in possession after conveyance discloses a fact inconsistent with the legal effect of his deed and which is suggestive of some right or interest in the premises; that under such circumstances a purchaser has no right to rely upon the legal effect of the deed in disregard of this antagonistic fact.

§ 274. **Liens and incumbrances.** If a party purchases and obtains a conveyance of land, having no notice, actual or constructive, of prior liens and incumbrances, he takes the land free from the same;[94] on the other hand, a party having notice of such facts as would put a prudent person on inquiry is chargeable with notice of other facts to which by diligent inquiry and investigation he would have been led.[95] If he takes a conveyance with notice of a prior lien he of course holds subject to the same, and the land in his hands is charged with its payment the same as if no conveyance had been made.[96]

§ 275. **Mortgages.** The attention of every person making an examination of title is usually directed toward the ascertainment of the fact of the existence of incumbrances upon the property by way of mortgage. The means of information in all ordinary cases is the public records, for the registry of a mortgage is notice to all subsequent purchasers and incumbrancers of the lien created thereby.[97] There are cases which hold that a mortgagee having deposited his mortgage for record has thereby discharged his full duty in respect to giving notice of his lien and his rights thereunder, and is not affected by any mistakes of the clerk in transcribing; but the better and, indeed, prevailing doctrine is that a subsequent purchaser is not bound to observe errors of this character, and that as to him the registry is notice of the tenor and effect of the instrument only as it appears upon the record.[98] Hence,

[93] Groff v. State Bank, 50 Minn. 234; Turman v. Bell, 54 Ark. 273.

[94] Dunlap v. Wilson, 32 Ill. 517.

[95] Bent v. Coleman, 89 Ill. 364; George v. Kent, 7 Allen (Mass.), 16.

[96] Dunlap v. Wilson, 32 Ill. 517; Martin v. Cauble, 72 Ind. 67.

[97] Dunlap v. Wilson, 32 Ill. 517; Martin v. Cauble, 72 Ind. 67.

[98] Stevens v. Hampton, 46 Me. 404; Barnard v. Campau, 29 Mich.

he is affected only as to the amount of the lien debt as mentioned in the record;[99] and the land in his hands, where the purchase is made in good faith and without notice from other sources, will be charged only with the amount expressed on such record.[1]

It is a further rule that where through inadvertence or mistake a wrong description has been inserted in a mortgage the record will not furnish constructive notice of such mistake and a purchaser for value, having no actual knowledge of such mistake, will take the land in the condition disclosed by the record. It often happens that through errors of the draughtsman a wrong section, town, or range, is given, the effect of which may be to locate the land many miles away from the place actually intended. As between the parties this error would be corrected, but a purchaser in good faith of the land intended to be mortgaged would be chargeable only with whatever the record disclosed. In such event, if the purchase money had been paid, he would hold the land freed from the mortgage lien, and, if only a portion of the price had been paid would still be entitled to protection as to the amount so paid before notice had been received of the outstanding equity.[2]

So, too, where the record shows that a prior mortgage has been satisfied, or the lien thereof released, even though no statement appears as to who made such payment, a purchaser having no other notice than that afforded by the record may assume that the payment was made by the party primarily liable and need not extend his inquiry beyond the record.[3]

§ 276. **Judgment liens.** After the registry of deeds the next field for investigation is the court records of unsatisfied and subsisting judgments. This search is of primary importance, and is a precaution that can never safely be dispensed with in an examination of title.

164; Miller v. Bradford, 12 Iowa, 14; Kilpatrick v. Kilpatrick, 23 Miss. 124.

[99] Terrell v. Andrew Co. 44 Mo. 309; Peck v. Mallams, 10 N. Y. 519; Dean v. Anderson, 34 N. J. Eq. 508.

[1] Luch's Appeal, 44 Pa. St. 519; Miller v. Bradford, 12 Iowa, 14; Gilchrist v. Gough, 63 Ind. 589.

[2] Davis v. Ward, 109 Cal. 186; Sanger v. Craigue, 10 Vt. 555.

[3] Ahern v. Freeman, 46 Minn, 156.

The matter of judgment liens is purely statutory; for judgments were not liens upon lands at common law,[4] and their efficacy, extent and duration are measured entirely by the statute which creates them. For this reason nothing more than a statement of general principles can be made in this connection.

An examination for judgments is generally made by consulting the judgment docket which should, of itself, furnish reasonably satisfactory evidence as to whether an incumbrance by judgment exists against the party from whom the proposed purchase is to be made or against any of his grantors. Hence, the docket of a judgment, in order to operate as constructive notice, should contain all the essential matters required by law and the statute in relation thereto must be strictly complied with. Any material defect or omission in this particular will, as a rule, avoid the effect of the judgment as against an innocent purchaser.[5]

The law, with respect to judgments and the effect to be given to them in connection with the rights or claims of persons not parties thereto, is not the same in all of the states. In many states the doctrine that the general lien of a judgment upon land is subject to any and all adverse equities or claims, whether secret and unknown, or recorded and known, prevails; and a previously-acquired equitable interest in lands has priority over the lien of a judgment against the holder of the legal title.[6] Where this doctrine obtains a purchaser of

[4] At common law a judgment created no lien on real estate, nor could it be sold on execution. But as trade developed, it was necessary to subject land to the payment of debts; and accordingly, in the reign of Edward I. (13 Edw. I. ch. 18), a statute, usually called the statute *de mercatoribus*, was enacted which authorized the judgment creditor to sue out the writ of *elegit*, by which the sheriff was required to have all of the debtor's goods liable to execution appraised and delivered to the creditor in satisfaction of his debt, and if insufficient for the purpose to deliver to him a moiety of his freehold estate until he should have execution of his judgment. This it was held created a lien on the lands of the debtor from the test of the writ.

[5] Davis v. Steeps, 87 Wis. 472; Hutchinson's Appeal, 92 Pa. St. 186; Crouse v. Murphy, 140 Pa. St. 335; as, where the statute requires the "name at length" of each judgment debtor and the docket omits middle names or initials; Ridgway's Appeal, 15 Pa.St. 177; Terry v. Sisson, 125 Mass. 560.

[6] Jones v. Rhoads, 74 Ind. 510.

such interest would undoubtedly be entitled to protection if no bad faith interfered to vitiate the transaction; but one who takes title to land apparently imperfect of record, and which seems of record to be, as in fact and law it is, subject to the lien of a judgment, cannot afterwards, upon learning that unrecorded deeds have been made, be allowed to claim title through them in order to defeat the lien of the judgment, when at the time of his purchase he had no knowledge of the existence of the deeds, and supposed he was getting the title as it appeared of record.[7] A purchaser of land with knowledge that it is subject to a judgment lien is not a *bona fide* purchaser.[8]

Where the lien of a judgment accrues after the execution of the contract of sale and before conveyance, if the vendee has been let into possession he will not be chargeable with notice of such judgment, and in any event the lien will attach no further than the unpaid purchase money remaining in his hands. Should the purchaser, without actual notice, make the remaining payments to the vendor, pursuant to the contract, such payments will operate to discharge the contract and no lien will attach to the land.[9]

The lien of a judgment ceases after a time, and to become again effective the judgment must be revived, but the general rule is that until this has been accomplished it exerts no effect upon the judgment debtor's lands. Hence, a purchaser during the *interim* would take the land discharged from the lien nor will the lien of a revived judgment relate back so as to defeat the title of a purchaser who acquires same between the date of the expiration of the lien and its revival.[10]

Where the record of a judgment bears upon its face the evidence that it has been satisfied, and an innocent purchaser,

[7] McAlpine v. Hedges, 21 Fed. Rep. 689.

[8] Cox v. Prater, 67 Ga. 588; but see Danielly v. Colbert, 71 Ga. 218. The statute has an important bearing upon these matters: thus, in Georgia, a *bona fide* purchaser of real property for a valuable consideration, who retains open and undisturbed possession for four years, holds the land discharged from the lien of a judgment against his vendor, although he had actual notice of the judgment at the time of the purchase. Sanders v. McAffee, 42 Ga. 250.

[9] Wehn v. Fall, 55 Neb. 547; Moyer v. Hinman, 13 N. Y. 180.

[10] Woodward v. Woodward, 39 S. C. 259; King v. Harris, 34 N. Y. 330; Bank v. Wells, 12 Mo. 361.

relying upon the record, purchases the land which might have been affected thereby, such purchaser will be protected even though it afterwards may appear that such satisfaction was improperly entered.[11] Indeed, as has been well said, any other view would shake confidence in the public records and jeopardize titles acquired upon the faith of what such records show.[12]

§ 277. **Decrees.** A decree being a matter of public record, a third person, having purchased of one of the parties to the record, is presumed to have done so with full knowledge of the decree.[13]

§ 278. **Mechanics' liens.** Aside from the actual or constructive notice furnished by a *lis pendens,* the subject of which has been sufficiently considered, a party purchasing lands on which buildings are in process of erection, having knowledge of the same, is bound to observe this fact, and to make inquiry as to the rights of parties furnishing materials or performing work thereon; and such person is charged with constructive if not actual notice of their lien.[14] The general doctrine of mechanics' liens provides that the lien shall take effect from the time of the commencement of the work, and that no sale or transfer of the land thereafter made is sufficient to divest it.[15] As statutes relating to mechanics' liens are constantly being subjected to legislative tinkering no positive rules of general observance can be formulated, but the foregoing have received a general recognition.

§ 279. **Vendors' liens.** In the absence of an agreement to the contrary, the vendor retains a lien on the bargained lands for the unpaid purchase money, notwithstanding he has made an absolute conveyance in fee to the vendee and put him in possession.[16] A purchaser from the vendee, with notice of the

[11] Charleston v. Ryan, 22 S. C. 339.

[12] Wheeler v. Alderman, 34 S. C. 533.

[13] Loomis v. Riley, 24 Ill. 307.

[14] Austin v. Wohler, 5 Ill. App. 300.

[15] Dunklee v. Crane, 103 Mass. 470; Thielman v. Carr, 75 Ill. 385; Mehan v. Williams, 2 Daly (N. Y.), 367. A mechanic may file his lien against the person who held the legal title when the work was commenced, and he is not bound to inquire further or take notice of any subsequent conveyances of the property. Fourth Ave. Church v. Schreiner, 88 Pa. St. 124.

[16] The lien is not of universal observance. See "Vendor's Lien,"

vendor's equitable lien for purchase money, will be charged with the same trust as the vendee;[17] for, although the vendee holds the vendor's deed, reciting full payment of the purchase money, yet one dealing with the vendee with reference to such land, with knowledge that the purchase money is not fully paid, is put on inquiry as to the amount due the vendor, which would lead to the ascertainment of the extent of the lien, if not waived; or, if waived, of the security which the vendor had taken in lieu of it. If such purchaser, being thus put on inquiry, fails to make proper investigation, relying on the vendee's statement or otherwise, he cannot claim protection against the enforcement of the vendor's equitable lien,[18] or against a mortgage on the lands, executed by the vendee to the vendor to secure the payment of the purchase money, on the ground of want of actual notice of its existence.[19] So, also, if the deed recites that the sale is made on credit, a subsequent purchaser is bound to inquire whether the purchase money has been paid; and, notwithstanding that the time for payment as stated in the deed has passed, there is no presumption that it has been paid. Such a recital is sufficient to induce inquiry, and must be regarded as notice.

Where the subject of the purchase is only an equity, a still stronger case is presented; and the fact that a vendor of lands holds only a bond for title is sufficient to charge the purchaser from him with notice of the previous vendor's lien for unpaid purchase money.[20]

§ 280. **Real estate charged with legacies.** Where title is deraigned through devise a purchaser from the devisee or those claiming under him is impressed with the duty of ascertaining the extent of the devisee's title and the manner of its investure. Notwithstanding that the land may have been specific-

post, for a full discussion of the subject.

[17] Graves v. Coutant, 31 N. J. Eq. 763.

[18] Deason v. Taylor, 53 Miss. 697.

[19] Foster v. Stallworth, 62 Ala. 547; and see Neal v. Speigle, 33 Ark. 64. Any notice or circumstance that tends to give notice or informs a party that there is an incumbrance upon land is sufficient to charge him with notice; and when such information comes to the knowledge of a purchaser the law requires him to pursue it until it leads to notice. Ætna Ins. Co. v. Ford, 89 Ill. 252.

[20] Newsome v. Collins, 43 Ala. 656; Haskell v. State, 31 Ark, 91.

ally devised it may be hampered with conditions or charged with legacies and payment of debts.

Legacies are primarily payable out of the personal estate of the decedent, and never out of the real estate, unless there is an express direction to that effect contained in the will, or unless an intention thus to charge may fairly be implied from the language used.[21] But a testator may exonerate his personal estate entirely and subject his realty alone to the burden; and when it clearly appears from the whole will that such was the testator's intention, the real estate will be the primary fund.[22]

While the earlier decisions would seem to indicate that a legacy could not be declared a charge upon realty unless so expressly stated in the will, the tendency of modern authorities is to place this matter on the same plane as other testamentary provisions; and the intention of the testator forms the governing consideration, regardless of technical rules. This intent will be effectual when found to exist in any form; and while a mere direction for the payment of debts and legacies will not alone create a charge,[23] yet when the testator directs his debts and legacies to be first paid and then devises real estate; or where he devises the remainder of his estate, real and personal, after the payment of debts and legacies; or devises real estate after such payment,—it has been held that the real estate is charged.[24]

§ 281. **Real estate charged with debts.** It is the policy of the law to protect the just claims of creditors of a decedent by subjecting the lands and tenements of which he died seized to their payment. The proper presentation and proof of such claims, in effect, raises a lien upon the lands, and other real property of the deceased, which may be enforced upon the failure of the personal assets in the hands of the executor or administrator. An inquiry is therefore imposed upon intending purchasers as to the condition of the title of

[21] Reynolds v. Reynolds, 16 N. Y. 259; Lynes v. Townsend, 33 N. Y. 562; Geiger v. North, 17 Ohio St. 568.

[22] Nash v. Taylor, 83 Ind. 349; Boylan v. Meeker, 28 N. J. L. 300; Heslop v. Gatton, 71 Ill. 530; Harris v. Douglas, 64 Ill. 472; Quinby v. Frost, 61 Me. 77; Davis' Appeal, 83 Pa. St. 348.

[23] Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614; Rogers v. Rogers, 1 Paige (N. Y.), 190.

[24] Lupton v. Lupton, 2 Johns. Ch,

an heir or devisee, when offered by them, and all doubts that may arise should be resolved before the purchase is consummated. Unless the estate has been properly closed and the administrator discharged after an accounting, the title cannot, in a just sense, be considered marketable, as some doubts growing out of the possible unsatisfied claims of creditors must exist. The duty of inquiry is even more imperative where title is asserted by the heir of an estate in which no probate proceedings have been taken.

The lien of a creditor is not perpetual, however, and may be barred by long delay or inexcusable laches. As a rule no statutes of limitation have prescribed the time within which land must be sold to pay debts of the estate, and a wide discretion is, for this reason, reposed in the courts. It has frequently been said that such lien must be asserted within a reasonable time, but this furnishes no guide, for what is a "reasonable time" has never been defined and rests wholly within the judgment, or even caprice, of the tribunal to which the question is presented. The circumstances of particular cases are so widely variant as to confuse rather than direct, and the only positive statement that can be made is that the creditor should move promptly and without unnecessary delay; failing in this he will be held to have waived his lien and a grantee from the heir will take title discharged therefrom.[25]

The earlier cases seem to have drawn the line with respect to laches much more strictly than later decisions, yet, as the circumstances of each case govern largely in the result arrived at, they furnish but poor precedents in the promulgation of any general rule. Each case is made to depend, in a great measure, on its own particular circumstances, therefore, a reasonable time in one might, in view of the situation, be very unreasonable in another. Hence we find a wide range in the decisions. One case lays down the rigid rule that an unexplained delay of one year will justify the refusal of a court to grant an application to sell for the payment of debts.[26]

(N. Y.) 614; Reynolds v. Reynolds, 16 N. Y. 259; Fenwick v. Chapman, 9 Pet. (U. S.) 470.

[25] McCoy v. Morrow, 18 Ill. 519; Mays v. Rogers, 37 Ark. 155; Hatch v. Kelly, 63 N. H. 29; Liddel v. McVickar, 11 N. J. L. 44; Gunby v. Brown, 86 Mo. 253; Estate of Crosby, 55 Cal. 574.

[26] Mooers v. White, 6 Johns. Ch.

In another, seven years was considered an abandonment of the right to sell.[27] Ten years, in another, was held to extinguish the lien,[28] but the same court, upon different circumstances, held that a delay of twenty years was not unreasonable in view of the facts shown.[29]

That such a condition of the law must be productive of much hardship requires no demonstration; that to a considerable extent it renders titles insecure is apparent. For these reasons the tendency of courts during recent years has been to base the rights of creditors upon terms corresponding to the statutes of limitation and by analogy to those statutes to fix periods within which such rights must be asserted. The convenience of the mercantile world, the policy of protecting innocent purchasers, and the security and repose of titles honestly acquired, demand some limitation of this character, and the doctrine is finding general acquiescence.[30]

In probated estates these questions do not ordinarily arise after final settlement, for, as a rule, the administrator is required to show a satisfaction of all proved claims before securing his discharge, and usually a claim not presented during the period limited for this purpose is barred.

§ 282. **Easements and servitudes.** It is a general rule that parties are presumed to contract with reference to the condition of the property at the time of sale. This is undoubtedly true; yet to affect a purchaser with notice of an easement in favor of an adjoining owner the easement, unless a matter of record, must be obvious and apparent to any observer. An apparent sign of servitude must exist on the land purchased; or, as expressed by some of the authorities, the marks of the burden must be open and visible.[31]

§ 283. **Pending litigation.** One who buys an estate pending a suit involving the question of title thereto will be considered a purchaser with notice, although not a party to the suit, and he will be bound by the judgment in the action just

(N. Y.) 360; the opinion is by Chancellor Kent.

[27] Hatch v. Kelly, 63 N. H. 29.

[28] Mays v. Rogers, 37 Ark. 155.

[29] Killough v. Hinton, 54 Ark. 65.

[30] See Ricard v. Williams, 7 Wheat. (U. S.) 59; Sumner v. Child, 2 Conn. 607; McCoy v. Morrow, 18 Ill. 519; Gregory v. Rhoden, 24 S. C. 90; Bishop v. O'Conner, 69 Ill. 431.

[31] Ingals v. Plamondon, 75 Ill. 118.

as the party from whom he bought would have been.[32] It is immaterial whether such purchaser had actual notice of the suit, for the rule is that every person who buys property under such circumstances is conclusively presumed to have notice of the pending litigation;[33] and, notwithstanding that the rule in its application may sometimes produce apparent hardships, it is always strenuously enforced. It is stated, as the reason of the rule, that if it were not so applied there would practically be no end to a litigation, and that the justice of the court would be continually evaded, thus producing a greater hardship and inconvenience to the suitor;[34] while the justness of the rule is further apparent when it is considered that to bring home to every purchaser the charge of actual notice of the suit must, from the very nature of the case, be in many instances in a great degree impracticable.[35]

The fact that the purchaser buys in ignorance of the suit and pays an adequate price for the property in no way serves to relieve him from the consequences of his acts; the conveyance in any event is so far a nullity that it can avail him nothing as against the title established in the pending suit; and, although there has been no actual fraud, the purchase will still be set aside on the ground of implied fraud.[36] The most that a purchaser under such circumstances can acquire would be the interest remaining in the vendor after the demands of the adverse party, as ascertained by the pending trial, shall have been fully satisfied.[37]

It is to be observed, however, that the application of the rule that a purchaser of property in litigation is bound by the judgment or decree made is confined to property directly in litigation; to property so described in the pleadings as to

[32] Allen v. Poole, 54 Miss. 323; Rollins v. Henry, 78 N. C. 342; Norton v. Birge, 35 Conn. 259; Edwards v. Banksmith, 35 Ga. 215; Leitch v. Wells, 48 N. Y. 608; Tuttle v. Turner, 28 Tex. 773.

[33] Rollins v. Henry, 78 N. C. 342; Smith v. Cottrell, 94 Ind. 381; Meux v. Anthony, 11 Ark. 422. In contemplation of law every man is presumed to be attentive to what passes in the courts of the state. Parker v. Conner, 95 N. Y. 118; Knowles v. Raflin, 20 Iowa, 101.

[34] Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 444.

[35] Parks v. Jackson, 11 Wend. (N. Y.) 459.

[36] Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Leitch v. Wells, 48 N. Y. 608.

[37] Allen v. Morris, 34 N. J. L. 161.

give a purchaser notice that the property which he buys is that involved in the suit,[38] and that the doctrine of constructive notice arising from *lis pendens* is not to be extended beyond the immediate subject-matter of the suit.[39] The property involved must, it is said, be so pointed out in the proceedings as to warn the public that they intermeddle at their peril.

It is further to be observed that the rule applies only to persons dealing with the defendant in the action, and has nothing to do with independent parties asserting their own adverse rights in the property. Hence, a purchaser of the very land described in the pleadings from one who is not a party to the suit, or a privy to such party,[40] is never chargeable with the constructive notice of *lis pendens*.[41]

§ 284. Partnership property. In a former chapter[42] occasion was had to discuss the general principles of law in respect to partnership holdings, so far as they affect the relation of vendor and vendee; and what is there stated may be profitably read in connection with this chapter. It is unnecessary to recapitulate such former statements; and, in this connection, it will be sufficient to observe that, where purchasers of real estate have actual or constructive notice at the time of

[38] Badger v. Daniel, 77 N. C. 251; Allen v. Poole, 54 Miss. 333; Miller v. Sherry, 2 Wall. (U. S.) 237; Brown v. Goodwin, 75 N. Y. 409.

[39] Shearon v. Henderson, 38 Tex. 264. Compare Green v. Slayter, 4 Johns. Ch. (N. Y.) 38. In this case the bill described the property as "divers lands in Cosby's manor, in the patent of Springfield, and certain tracts or parcels of land in Oriskany patent;" and the court held that the purchaser was chargeable with notice of the pendency of the suit and of all the facts stated in the bill, and that the description of the lands, though general, was sufficient to put him on inquiry.

[40] It is only parties and their privies in blood or estate that are estopped by a decree or judgment and parties to a decree, in the eye of the law, are those only who are named as such in the record, and are properly served with process or enter their appearance. A privy in blood or estate is one who derives his title to the property in question by descent or purchase; and a privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit and from a party thereto.

[41] French v. Loyal, 5 Leigh (Va.), 627; Parsons v. Hoyt, 44 Iowa, 154; Clarkson v. Morgan, 6 B. Mon. (Ky.) 441; Herrington v. Herrington, 27 Mo. 560; Scarlett v. Gorham, 28 Ill. 319; Miller v. Sherry, 2 Wall. (U. S.) 250.

[42] See chapter II, sec. 58, *ante*.

their purchase that same is partnership property, it will be chargeable in their hands with the payment of the partnership debts, although they may have had no notice of the existence of those debts. If they had no notice that it was partnership property, they will be exonerated to the extent of the purchase money paid by them, and so far as the purchase money has not been paid, it will be regarded as a substituted fund chargeable in their hands with the same burdens as the land.[43]

§ 285. **Notice to agent.** The authorities seem to be united upon the proposition that notice to the agent of a purchaser is notice to the purchaser;[44] and, in like manner, notice to a partner in a purchase of lands of prior rights or equities is notice to the other partner.[45] So, also, notice to the attorney is as effectual as to the client;[46] yet it does not seem that a party is chargeable with notice of facts within the knowledge of his attorney which became known to him while acting as the attorney of another person.[47]

§ 286. **Joint purchasers.** While it seems to be the rule that a notice to a partner in a purchase of lands of prior rights or equities is notice to the other partners, yet in the case of a purchase made by several jointly or as tenants in common, if there is in existence an incumbrance or conveyance affecting the title to the land, those who have notice of the same will hold their title in subordination to it, while those who did not have such notice will hold their title free from the claim to which their co-tenants are subjected. This, it is held, will always be the case where there is no proof that the parties affected with notice were not acting as the agents or attorneys of the others, or by virtue of a partnership.[48] The rule that notice to a co-tenant is not, by mere force of the relation, notice to any of his companions, unless in case of notice to quit, seems to be fully applicable to a case of this kind.[49]

[43] Hoxie v. Carr, 1 Sumn. (C. Ct.) 173.

[44] Bigley v. Jones, 114 Pa. St. 510; Meier v. Blume, 80 Mo. 179; Smith v. Dunton, 42 Iowa, 48.

[45] Rector v. Rector, 3 Gilm. (Ill.) 105.

[46] Williams v. Tatnall, 29 Ill. 553.

[47] Herrington v. McCollum, 73 Ill. 476; Campbell v. Benjamin, 69 Ill. 244.

[48] Wait v. Smith, 92 Ill. 385; Snyder v. Sponable, 1 Hill (N. Y.), 567.

[49] Wait v. Smith, 92 Ill. 385.

§ 287. **Rebutting presumption of notice.** Where circumstances are brought directly home to the knowledge of a purchaser, sufficient in law to put him on inquiry and thus amount to notice, he will be entitled to rebut the presumption of notice which would otherwise arise by showing the existence of other attendant circumstances of a nature to allay his suspicions, and lead him to suppose the inquiry was not necessary.[50] So, also, where the circumstances relied on as sufficient to charge a party with notice by requiring him to make inquiry may be equally as well referred to a different matter or claim as to the one he is sought to be chargeable with notice of, they will not be sufficient.[51]

[50] See Rogers v. Jones, 8 N. H. 264; Williamson v. Brown, 15 N. Y. 354.

[51] Chadwick v. Clapp, 69 Ill. 119.

CHAPTER X.

THE ABSTRACT.

§ 288. General principles.
289. Duty of furnishing abstract.
290. When the abstract is made a condition.
291. Right to time for examining title.
§ 292. Good and sufficient abstract.
294. Originals and copies.
295. What the abstract should show.
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§ 288. **General principles.** It has now become an almost universal custom in all cases of transfer of real property for the vendor to furnish to the vendee satisfactory evidences of the soundness of the title which he asserts and of his right to claim and dispose of the estate which forms the subject-matter of the negotiation. For this purpose the vendor would most naturally produce his muniments of title—the deeds or matters in writing upon which he founds his claim of ownership. But as the arrangement and perusal of these documents must often occasion much loss of time, a practice grew up in England during the latter part of the eighteenth century of making an orderly synopsis of all the material and operative parts of the instruments which constituted the vendor's chain of title; and this synoptical chain, called an abstract of the title, was given to the vendee prior to the consummation of the contract, in order to expedite his labors in the examination of the vendor's proprietory rights.

This practice of the English conveyancers was adopted by the legal profession in America, and soon became of even more importance here than in the country of its origin, for the reason that title deeds are rarely preserved for any length of time, and could not in many instances be produced—the public records being regarded as the greatest depositories of title, and the individual paying but little attention to his muniments after they had once been transcribed. To search the records, even while it might be an imperative legal duty, was nevertheless a task of such herculean proportions as to render it in many cases absolutely impossible; and so a dis-

tinct branch of legal practitioners has been gradually developed whose sole duty is, by properly-prepared indices and references, to procure and furnish from the public records the same general and special information that the English conveyancer culled from the original instruments in his hands, the work of the American practitioner retaining the same name that had been given to its English prototype, viz., an abstract of the title.

The American abstract differs in many particulars from that in use in England, being far broader in its scope and extending its inquiries not only among all classes of documents and papers that may disclose claims or equities, but also to the judgments and decrees of courts of record, and to such liens as may be created by any of the municipal agencies of the state. When properly prepared it constitutes an almost indispensable adjunct to every contract of sale, and its production is usually made a condition precedent in all agreements for conveyance.[1]

§ 289. **Duty of furnishing abstract.** In England a purchaser may, it seems, require to be furnished with an abstract of the seller's title, even though he may have already agreed to accept the same, and may retain such abstract during the negotiations upon, and even after rejection of, the proffered title, until the dispute is finally settled, for the purpose of showing the grounds of such rejection.[2] It will be remembered, however, that an English abstract is frequently only a digest of the title deeds and muniments relied on by the vendor to establish his claim, and which invariably accompany the abstract for examination and comparison. The abstract so furnished, therefore, is rather in the nature of a well-arranged index to accompany documents, and is prepared primarily for their more convenient and systematic perusal. An American abstract, on the contrary, is intended to furnish within itself a full exposition of title, and to obviate the necessity of referring to the original sources of information. In

[1] The author modestly calls the attention of those of his readers who may desire to pursue this subject more in detail to his own work on "Abstracts of Title," being the only American work on this important subject, and suggests that its perusal could be most advantageously made in connection with the present work.

[2] See 2 Sudg. Vend. *39; Dart. Vend. (Am. ed.) 130.

the former case the deeds and muniments are in the hands or under the control of the vendor, and the reason of the English rule is obvious from this fact alone. But in the United States the changed conditions of the evidences of title, the actual and constructive notice imparted by registration, and the access which the purchaser has to information concerning the title, would seem to render inoperative the English rule by removing the reason which occasioned it; and, while it is customary in this country, as in England, for the vendor to prepare and furnish an abstract of title, either pending or after consummation of the sale, it does not appear that this can be demanded as a matter of right, but is rather the result of the contract or conditions of sale.

In England, where titles are not registered, save in a few counties, the vendor, in order to show performance or an offer to perform on his part, whether in an action at law for the purchase money or a suit in equity to compel performance by the vendee, must affirmatively prove his title. In this country, where titles are matters of record, and at all times open for inspection, a different rule prevails. This doctrine has often been asserted in actions by the vendor for the purchase money;[3] and it has been expressly held, in equity, that a vendor may rely upon his tender of conveyance without producing the evidences of his title, the burden being upon the purchaser to show such a defect as would justify him in refusing to accept the deed.[4]

It would seem, therefore, that where the parties do not stipulate that the condition of the title shall be ascertained from any particular abstract, or from an abstract to be furnished by the vendor, it is incumbent on the purchaser, should he desire to avail himself of this assistance, to provide the abstract himself and to satisfy himself as to the condition of the title.[5]

§ 290. **When the abstract is made a condition.** While the furnishing of an abstract cannot be said to be demandable as a matter of legal right, even where a custom to that effect may prevail, it is nevertheless a condition precedent in most

[3] Little v. Paddleford, 13 N. H. 167.

[4] Espy v. Anderson, 14 Pa. St. 308; Daily v. Litchfield, 10 Mich. 38.

[5] Easton v. Montgomery, 90 Cal.

sales by the express agreement of the parties. Where parties make a contract for the sale or exchange of lands which provides for the exhibition of an abstract showing title in the proposing parties by a day named, this is a condition precedent to be performed before either party in case of an exchange, or the vendor in case of sale, can call upon the other to perform the agreement; and, if the abstract is not satisfactory or fails to show the title agreed to be made, the other may elect to consider the contract at an end.[6] The party required to furnish the abstract has no right to demand an extension of time in which to furnish an additional abstract, the first not showing title as agreed; and if the other party refuses to give such extension or refuses to perform for want of an abstract in proper time showing title, this will put an end to the contract.[7]

But where the contract provides that the vendor is to furnish an abstract, and notice is given where such abstract may be found and inspected, it would seem that failure of the vendor to furnish the same, when no objection is urged at the time, will not authorize the purchaser to rescind.[8]

§ 291. **Right to time for examining title.** Usually the time allowed for an investigation of the title is fixed by the provisions of the contract, and this is almost invariably the case where the vendor also agrees to furnish or exhibit an abstract. But even in the absence of such stipulations the purchaser is entitled to a reasonable time for such examination before making payment;[9] and a stipulation to this effect may be implied where the conditions of the contract provide for a

307; Espy v. Anderson, 14 Pa. St. 308.

[6] Howe v. Hutchison, 105 Ill. 501.

[7] Howe v. Hutchison, 105 Ill. 501.

[8] Papin v. Goodrich, 103 Ill. 86. The abstract in this case was in the hands of a third party who then held a loan upon the property which the purchaser, by the terms of the contract, was bound to pay. The purchaser was notified where the abstract was, and that it could be examined there at any time. No objection was made to this; but subsequently the vendor was notified by the purchaser that he declined to carry out the contract because it was then too late, but this objection the court held to be untenable; and as the purchaser's refusal to perform was placed on another ground than the failure to furnish the abstract, it was held that no right of rescission existed.

[9] Allen v. Atkinson, 21 Mich. 351.

return of the deposit in case the title should be found defective.[10]

§ 292. **Good and sufficient abstract.** It has now become common to insert in agreements for sale and conveyance not only a stipulation for a "good and sufficient" deed of conveyance of the property in question, but also, where the vendor undertakes and agrees to exhibit his title, a clause providing for the furnishing of a "good and sufficient" or "merchantable" abstract of title. In many localities this clause, if employed, would occasion no controversy, and local custom would probably be sufficient to indicate what was meant. Yet in other places which have come under the observation of the writer the proper answer to "What constitutes a 'good and sufficient' abstract?" has been the subject of much heated controversy among real estate brokers and attorneys. The former class, as a rule, care little about the abstract, which they are ever inclined to regard with suspicion, and consider as the most dangerous ingredient that enters into the composition of the trade. Should it be rejected by the attorney who has been selected to "pass the title" as insufficient or unreliable, a disagreeable hitch ensues, and the negotiation itself must often be abandoned.[11] No effort has ever been made to settle this much-vexed question by a statutory enactment, and from the peculiar nature of the subject probably no movement in this direction will ever be made. Indeed, none can be made with advantage; and the question can best be settled, if at all, by

[10] Easton v. Montgomery, 90 Cal. 307.

[11] "It has been found that the abstracts of title upon which transfers are made are of many different kinds and of widely-varying value —originals from numerous private firms and from the county recorder—copies written and printed, certified and uncertified, issued by abstract men, printers, lawyers, notaries and real estate men. It has been found that there is a wide diversity of practice on the part of our agencies and the attorneys as to the recognition or rejection of these various classes of abstracts when presented for acceptance by borrowers and sellers; abstracts which readily pass current with many being rejected as valueless by others. From this lack of uniformity arises constant friction and confusion; in many cases heavy expenditures are enforced upon unfortunate owners in replacing rejected abstracts with acceptable ones; sales are broken up, owners disgusted with real estate; agents dissatisfied over the loss of time and commissions, and attorneys in previous examina-

the institution and maintenance of a uniform custom. In populous cities real estate boards, acting in concert with the bar, may do much to definitely settle local usages by prescribing conditions or defining terms. In other places bar associations might advantageously decide what shall and what shall not be taken as a "good and sufficient" abstract in their respective localities. No judicial decisions directly involving the point under consideration are known to the writer, or could, on diligent search, be found.

Generally considered, a stipulation to deliver a good and sufficient abstract is fully complied with where the synopsis furnished purports to be a full search through the public offices,[12] is arranged in an orderly manner for perusal and its correctness is certified by some person of known skill and undoubted financial responsibility. More than this could not reasonably be demanded; but it would seem that, for the double purpose of convenience and safety, nothing less should be accepted.

Public officials, usually the recorder of deeds or the person having the official care and custody of real estate records, are in some states empowered by law to prepare and furnish abstracts of the records, certifying the same under their hands as such officers, and attesting their certificates with the seal of their office. Compilations so made are generally regarded as "regular," and taken to be a full compliance with the stipulation to furnish a good or merchantable abstract. Experience has demonstrated, however, that the best and most satisfactory work is done by private persons or firms exclusively engaged in the business of furnishing abstracts, provided their certificates are backed by sufficient financial ability to respond in damages for error or omission.

§ 294. Originals and copies. The worth or worthlessness of an abstract is often judged by its character as an original examination or as a copy of the same. Strictly speaking, an

tions annoyed and embarrassed at the throwing out of abstracts passed upon by them." Extract from Committee Report to Chicago Real Estate Board, 1887.

[12] The examiner usually certifies that his examination has been of his own indexes to the public records, but this distinction is verbal only and in no way lessens his liability in case of an incorrect or insufficient statement of the condition of the title.

"original" is the first manuscript work made directly from the public records; but as private indices have now come into general use to simplify and systematize the making of abstracts, the compilations made from these indices by the owners are generally regarded and taken as "originals." Duplicates and copies of these originals, made and certified by the maker of the originals, are for all intents and purposes as good as such originals, and may fairly be classed with them. An abstract in either of the above forms, possessing the incidents prescribed in the preceding section, is in every sense of the word "merchantable," and should satisfy any reasonable purchaser. But in addition to these forms it is not uncommon for owners of subdivisions and others to multiply copies of the original through the media of manuscript copyists, the "hectograph" and the printing press, with certifications by the writers or the printer, certificates of comparison by notaries, and often with no certification whatever. All of these forms are bad; they differ only in degree, not in kind.

It has been claimed that printed copies are far more reliable and trustworthy than where a number of written copies are made from the same original. Undoubtedly this is true; and where the work is properly and conscientiously performed, a printed copy is much to be preferred. But the fact remains that attorneys frequently refuse to accept them or predicate opinions upon them, and the general impression seems to prevail that they are inherently vicious. The reason for this lies mainly in the fact that the temptation for the interpolation of foreign matter or the suppression or expurgation of original matter is so great that unscrupulous parties not infrequently do not hesitate to resort to such expedients to conceal the defects of imperfect titles. A printed copy, if made by an honorable and responsible person, who at the close of such copy appends a certificate of verification, loses some of its objectionable features; yet this is but a poor protection, as the printer merely presents what he finds, and if foreign matter has been introduced into the original it will of course be reproduced in the duplicate. Nor does the fact that a comparison of such duplicate with the original has been made by a notary, and of which fact a certificate under his hand and official seal accompanies the copy, make the copy much if any more reliable. In both of these instances the opportunities for

fraud and imposition are present; while ignorance, carelessness, mistake and accident may all conspire, where no bad faith exists, to render such copy inaccurate and unreliable.

The foregoing remarks have reference to printed copies prepared by the owners of subdivisions and issued on their authority only. This has been a very common practice in every city of importance in many states, particularly in the West, and the prejudice against this form of copy has arisen through the fraudulent practices which often accompanied the method. If a printed copy is properly certified as correct by the person who prepared the original, or by some other trustworthy person of financial responsibility, it is not to be distinguished from an authentic copy in any other form.

§ 295. **What the abstract should show.** The primary office of the abstract is to save time and facilitate labor. Its object is to relieve intending purchasers from the necessity of examining the public records, and inspecting such portions thereof as may affect the title which forms the object of the sale. This burden is imposed by law, and cannot be avoided; and hence the abstract should be so compiled as to fully apprise the purchaser of every incident connected with the title as disclosed by the records. This would include the material and operative parts of all instruments of conveyance of every kind and nature, together with full and lucid statements of all liens, charges or liabilities to which the land might be subject; and the synopsis should be so arranged, with reference to chronological sequence, as to properly show the origin, course and incidents of the title, without the necessity of referring to the original sources of information. For all practical purposes of examination the abstract takes the place of the records, and presumably obviates all necessity of reference thereto; hence it should be full and explicit, with liberal quotations from the instruments whenever a presentation of the exact language employed is necessary to a better understanding of its import, and not, as is too often the case, merely a sparsely-filled and imperfectly-woven chain, which usually serves no better purpose than a mere index, throwing upon the purchaser all the labor of direct examination whenever questions of moment are raised.

Nor should the abstract be confined to the elucidation of a

single issue, as the mere tracing of the title of the vendor to the exclusion of adverse titles, or claims, or evidences of title. This is or was formerly the English practice; and, as the American abstract is only an adaptation of the methods of the English conveyancers, it is not uncommon in some parts of the country to find abstracts compiled on this plan—that is, "an abstract of the title of Jno. Smith to," etc. A properly-prepared abstract shows the true condition of the title, and the office of counsel, to whom the abstract is intrusted for examination, is to decide in whom the title vests. A purchaser examining the records must observe everything that lies in the apparent course of title, and in most cases everything that in any way implicates it, whether adverse or consistent with the ownership of the vendor. This the abstract should show. The judgments, decrees and orders of courts, when they affect the title directly or collaterally, are also of the highest importance, and frequently the anterior proceedings which culminated in such judgments or decrees; while tax levies, assessments and liens and sales made thereunder are equally important. These comprise the essentials of an abstract, and the omission of any of them is to render the abstract imperfect.

In addition thereto further information may be required by counsel, which is usually furnished by the vendor from other sources than the public records. Thus, in the case of titles by descent, the proof of heirship upon the probate of the ancestor's estate takes the place of the pedigrees so often annexed to English abstracts; but if there has been no probate, the information must be supplied by other means. Generally this is accomplished by affidavits of persons cognizant of the facts. So, also with respect to marriages. It is only during very recent years that any systematic attempt has been made on the part of the state to collect and preserve, in the form of authoritative records, any data with respect to the social or domestic relations of its citizens. Marriage registers have usually been kept as part of the parochial records of many denominational churches; and, for want of better evidence, entries made in such registers have been received as evidence of the facts they purport to state. State registration has been established in many states, and greater pains are now generally used to preserve reliable data of births, deaths and

marriages;[13] yet, even where such registers are kept, the information they furnish must often be supplemented by evidence *aliunde* in order to show identity of person. This evidence usually takes the form of an affidavit reciting the facts. Such affidavits, being only *ex parte* statements, and because not being made under the sanction of a court or in any legal proceeding, are not strictly evidence for any purpose, yet, being usually all that can be adduced, they are resorted to by counsel under a choice of difficulties, and have been, as it were, by common consent of the profession, adopted as competent proof in the examination of titles and the testimony taken as corroborative evidence of general reputation, etc. Again, such affidavits, though inadmissible under the rules of evidence, are valuable from the reason that they show that living persons can at the time establish the facts therein recited.

§ 296. **Root of title.** There must of necessity be some definite point at which an examination of title should commence, and beyond which it should not necessarily be extended; but in the United States there is no rule, nor can there be said to be any general custom having the force of a rule, which provides with any degree of certainty how far back an examination should extend. It was formerly customary in England to commence at some agreed point in the history of the title sixty years back, and Mr. Sugden and other English writers announce this as a general rule; but recent legislation in that country has considerably abridged the period of limitation, and, by so doing, removed the necessity of the rule.[14]

[13] Such records when made and kept pursuant to law, are received as presumptive evidence of the marriage, birth or death so recorded. State v. Wallace, 9 N. H. 515; Milford v. Worcester, 7 Mass. 48; State v. Potter, 52 Vt. 33; Niles v. Sprague, 13 Iowa, 198.

[14] In England, by statute (37 and 38 Vict. ch. 78), on the completion of any contract of sale of land made after December 31, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the former period of commencement, but with a proviso that earlier title than forty years may be required in cases similar to those in which earlier title than sixty years was required.

Upon a sale of leasehold property, without any condition protecting the vendor against the production of deeds, the vendor is

Whenever practicable the abstract should disclose the inception of title, irrespective of time; but where this cannot be readily done, it should commence with some well-authenticated fact at some period remote enough to cover any adverse interest or equity that could successfully be asserted. This period would, of course, be fixed with reference to the statutes of limitation. Thus, ten years, and in some states seven years, would be sufficient to cover judgment liens, and possibly some other classes; while twenty years, which is the term during which actions will lie for the recovery of lands, would in a majority of cases be sufficient. But, as the disability of parties, intervening estates, and other circumstances might be sufficient to prevent the statute from running, whatever point is selected as the root of title, great care must be employed, and exigencies will arise in the course of many titles that would justify the rejection of the same when a period of not more than twenty years is covered by the search.

§ 297. **Perusing the abstract.** Mr. Sugden, among his many excellent suggestions relative to examinations of title, says: "The perusal should, if the length of the abstract will permit of it, be finished at one sitting, although any difficult point of law, the whole bearing of which is not ascertained, may properly be reserved for further and separate consideration."[15] He further suggests that it may be well to glance over the abstract in the first place in order to obtain a general view of the title, and that experience will rapidly point out when a subsequent part of the abstract may be looked into before its proper turn; but that, generally speaking, an abstract should be perused but once, and that once effectually. It will be remembered, however, that the abstract to which Mr. Sugden referred was very different in its general complexion and make-up from the abstracts now in current use in this country, and was invariably accompanied by the muniments which it professed to exhibit. The difference in the plan of compilation, as well as the effect of the instruments with reference to registration, notice and other incidentals not common to the English

bound to produce the lease which is the root of his title, although the lease is more than sixty years old.

[15] 2 Sugd. on Vend. (8th Am. ed.) 9.

abstracts, renders a somewhat different course necessary from that pointed out by Mr. Sugden. Whether the abstract be long or short, and the title simple or complicated, a general perusal, in order to obtain a preliminary view, should first be made. This perusal is only to establish the fact of an apparent chain of title from its source—the government—or from some person proposed in whom an indefeasible title is assumed to have been vested. To assist in arriving at a correct estimate an analysis of the abstract must always be made in intricate cases, and the same will be found useful in every case. Having established the fact of apparent title extending in unbroken sequence from the initial point to the person by whom it is last asserted, a critical review of every remove[16] must then be made to determine its effect and validity in much the same manner, and for much the same purpose, as the English counsel examines the muniments. All defects, whether of form or substance, are noted upon the analysis just mentioned, together with notes of discrepancies, queries, objections and requisitions for further information. It would be unwise, however, to lay down any unvarying rule for a matter of this kind. Men's minds are not alike, and the methods that insure the best results in the case of one may be entirely inadequate in the case of another. The counsel's personal professional habits will, after all, be the best guide.[17]

[16] For want of a better name, each link in the chain, whether by deed, will, mortgage, lease, etc., is called a "remove;" and the removes are all numbered *seriatim* from the beginning, and referred to by number whenever occasion calls for reference.

[17] See Warvelle on Abstracts, 612.

CHAPTER XI.

OBJECTIONS TO TITLE.

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§ 298. Generally considered. The object of an abstract of the title is to facilitate investigation, and to enable intending purchasers to acquaint themselves with the condition of the title they propose to buy. It takes the place of an examination of the records, and is supposed to disclose all the information material or necessary to a proper understanding of the vendor's claim of ownership. The duty of investigation is imposed by law and cannot be avoided; and if the purchaser sees fit to forego such examination he does so at his peril, and cannot be heard to disclaim any knowledge which such examination would have afforded.[1] Whether such investigation be made by inspection of the records or by a perusal of the abstract, it is a further duty of the purchaser to note all such

[1] Every man purchases at his peril, and is bound to use some reasonable diligence in looking to the title and competency of the seller. It will not answer to rest upon mere reputation or belief,

facts as may tend to show impairments, defects, flaws or other imperfections of title, and to found objections upon them. He is entitled to satisfactory explanations, and has the right to call upon his vendor to make good any defects. This is accomplished by what are technically termed "requisitions." If a descent is shown, but not in a satisfactory manner, and a subsequent deed executed by the heirs at law of the person last seized, a requisition should be made for further evidence touching the legitimacy of the claim of title thus asserted. Partitions among heirs by the mutual interchange of deeds call for inquiry where a minor's rights may be affected; deaths and marriages, claims for dower and a number of like incidents may all call for inquiry, and serve as proper foundations upon which to lodge objections.

The general subject of this chapter is inseparably connected with that of specific performance, and the details of the subject as hereinafter developed are, in the main, properly classed with the different phases of the law relating to specific performance and rescission whenever those subjects are treated. But inasmuch as objections are usually made at or about the time of the examination of the title, they seem to follow in a sort of logical sequence at this stage of the work; and it is hoped that the indulgent reader will see no incongruity in the introduction of the subject at this time, but will kindly permit this chapter to supplement the succeeding chapters on specific performance and rescission, despite the fact that it precedes them in the order of arrangement.

The terms of the contract of sale will, in many instances, determine the question of title when raised; but ordinarily, while a purchaser will not be compelled to accept a title palpably defective, he cannot justify his refusal to accept by mere captious objections; nor is it sufficient for him, when the jurisdiction of a court is invoked to compel him to perform his contract, merely to raise a doubt. A defect in a record title will, under most circumstances, furnish a defense to a purchaser, particularly where it affects the value of the property or would interfere with its sale, and thus render it unmarketable;[2] but there is no inflexible rule, in the absence

unless the party intends to rely upon his covenants alone. Havens v. Bliss, 26 N. J. Eq. 363.

[2] Shriver v. Shriver, 86 N. Y. 575. If a written contract for the sale of land contains all of the

of stipulations to the contrary, that a vendor must furnish a perfect title of record, and it has frequently been held that defects in the record or paper title may be removed by parol evidence.[3] Where, however, the title depends upon facts incapable of satisfactory proof, or if capable are not so proved, objections will properly lie, and the purchaser will be under no obligation to complete his contract.

§ 299. **A marketable title.** In the absence of any stipulations relative to the character of the title to be conveyed, a "marketable" title is always presumed; that is, a title free from flaws or serious defect, and of such a character as will assure to the purchaser the quiet and peaceable possession of the property.[4] Such a title should extend to show a full and perfect right of property and present possession vested in the vendor;[5] it should embrace the entire estate or interest sold, which, unless otherwise specified, should be the fee,[6] and that free from the lien of all burdens, charges or incumbrances.[7] It should not only be free from litigation,[8] but from palpable defects[9] and grave doubts.[10] It should further consist of both the legal and equitable titles,[11] and be fairly deducible of record.[12]

It is believed that the foregoing enumeration fairly answers all the reasonable requirements that go to constitute a marketable title, particularly as this term is understood in the United States; but it must not be inferred that a title to be

other requisites necessary to give it validity and to make it binding on the vendor, the law will imply an agreement by him that he has and will give to the purchaser a good title. Winn v. Henry, 84 Ky. 48.

[3] Hellreigel v. Manning, 97 N. Y. 56.

[4] Barnard v. Brown, 112 Mich. 452.

[5] Delevan v. Duncan, 49 N. Y. 485; Davis v. Henderson, 17 Wis. 105; Jeffries v. Jeffries, 117 Mass. 184.

[6] Taft v. Kessel, 16 Wis. 273; Powell v. Conant, 33 Mich. 396.

[7] Roberts v. Bassett, 105 Mass. 407; Jones v. Gardner, 10 Johns. (N. Y.) 266; Davidson v. Van Pelt, 15 Wis. 341.

[8] Speakman v. Forepaugh, 44 Pa. St. 363; Jordan v. Poillon, 77 N. Y. 518.

[9] Smith v. Robertson, 23 Ala. 312; Holland v. Holmes, 14 Fla. 390; Jenkins v. Fahey, 73 N. Y. 355.

[10] Scott v. Simpson, 11 Heisk. (Tenn.) 310; Moore v. Appleby, 108 N. Y. 237.

[11] Taft v. Kessel, 16 Wis. 273.

[12] Martin v. Judd, 81 Ill. 488.

marketable must possess all of the incidents mentioned. Thus, a title may be marketable although depending on presumption grounded merely on the lapse of time, a clear adverse possession for twenty years making a title which, in many instances, a purchaser may not refuse.[13]

But in every instance, however the title may be derived, it must be free from reasonable doubt.[14] If it is open to judicial doubt it is not marketable, although what is sufficient ground for judicial doubt is not to be conclusively reduced to fixed and determined principles; for that depends in some degree upon the discretion of the court. A title may be doubtful because of the uncertainty of some matter of fact appearing in the course of the deduction of it; and if, after the vendor has produced all the proofs that he can, a rational doubt still remains, the title is not marketable.[15] A purchaser will not be compelled to complete his purchase where there is some reasonable ground of evidence shown in support of an objection to the title, or where the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet is not so proved.[16] Nor will the courts compel the specific performance of a contract by the purchaser where the validity of the vendor's title depends upon a doubtful question of law, where others having rights dependent

[13] Sherman v. Kane, 86 N. Y. 57; Ford v. Wilson, 35 Miss. 504; Grant v. Fowler, 39 N. H. 104; Schall v. R. R. Co. 35 Pa. St. 191; Hodges v. Eddy, 41 Vt. 485; Simson v. Eckstein, 22 Cal. 580; Walker v. Ray, 111 Ill. 315; De-Long v. Mulcher, 47 Iowa, 44; Dupont v. Starring, 42 Mich. 492. Thus, specific performance of an agreement to buy land will be enforced where the title is based on adverse possession and payment of taxes for nearly sixty years, there being no outstanding minorities which could be set up in support of the paper title against which the adverse possession was held. Ottinger v. Strasburger, 33 Hun (N. Y.), 466.

[14] Bensel v. Gray, 80 N. Y. 517; Jeffries v. Jeffries, 117 Mass. 184; Ludlow v. O'Niel, 29 Ohio St. 182; Morrison v. Kinstra, 55 Miss. 76; Powell v. Conant, 33 Mich. 396; Vreeland v. Blauvelt, 23 N. J. Eq. 483.

[15] It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed on the existence of which vendor's title depends. Emery v. Grocock, 6 Madd. (Eng. Ch.) 54; and see Moore v. Williams, 115 N. Y. 586; Gregory v. Christian, 42 Minn. 304.

[16] Shriver v. Shriver, 86 N. Y. 575.

upon the same question are not parties to the action.[17] On the other hand, an objection cannot be founded on unsubstantial trifles;[18] and a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence of which the case admits, amounting to a moral certainty, is given that no such cause exists, is not to be regarded as a sufficient ground for a refusal to perform the contract.[19]

So, too, while the rule is general, that a disputable fact not determined by the judgment in the action is a bar to the enforcement of the sale, such rule cannot be said to be absolute. In its application a discretion is, to some extent, vested in the court; and if the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which, according to ordinary experience has no probable basis, it seems a court may compel a purchaser to complete the purchase.[20]

Neither can a party rely upon professional advice he may have received with respect to the title, and, hence, an opinion of counsel of admitted standing and ability, that the title to the land in question is defective or doubtful, will not justify a purchaser in receding from the contract, when the title is in fact perfect and a conveyance is tendered.[21]

One bound by an executory contract to purchase land need not fulfill his contract if there is a cloud on the title. The defect need not consist of an outstanding title which is necessarily paramount;[22] it is sufficient if it creates a doubt,[23] or raises a question which can only be settled by litigation.[24] Nor need such a title be positively invalid; it is enough that it is subject to so much doubt that a purchaser ought not to be compelled to accept it.[25] It may still be a valid title though

[17] Abbott v. James, 111 N. Y. 673.

[18] Webb v. Chisholm, 24 S. C. 487.

[19] Moser v. Cochrane, 107 N. Y. 35.

[20] Ferry v. Sampson, 112 N. Y. 415.

[21] Montgomery v. Land Bureau, 94 Cal. 284.

[22] Estell v. Cole, 62 Tex. 695.

[23] Jeffries v. Jeffries, 117 Mass. 184; Gill v. Wells, 59 Md. 492; Powell v. Conant, 33 Mich. 396.

[24] Butts v. Andrews, 136 Mass. 221; Charleston v. Blohme, 15 S. C. 124.

[25] Richmond v. Gray, 3 Allen (Mass.), 25.

charged with incumbrance;[26] but where the agreement does not mention the title to be given, an implication arises that it is to be free from incumbrances;[27] nor will the purchaser be bound to take it subject to easements.[28]

A marketable title should carry with it an assurance of security in the possession and enjoyment of the land;[29] and hence it follows that a purchaser should not be required to complete his bargain where there is a reasonable chance for any person to lawfully raise a question against the title. It is immaterial that the danger to the purchaser to all seeming is very slight and very remote; it is enough that it exists, and that while it exists as a matter of law as well as of fact it may operate to the purchaser's detriment. It would seem, therefore, that however strong the probability may be that the objectionable matter will never be asserted against the estate, yet as long as it amounts to no more than a probability the title cannot in any just sense be said to be marketable. It is true that a title free from reasonable doubt may be forced upon an unwilling purchaser; but this is only where there is a doubt as to whether there exists, in law or in fact, any defect in the title. When it is ascertainable that there is an existing defect, the purchaser will not be compelled to perform merely because it is doubtful whether the defect will ever incommode him.[30]

§ 300. **"Satisfactory" title.** It is by no means an unusual practice for parties to stipulate in their agreements of sale for the production of a "satisfactory" title, or a title "satisfactory" to the vendee, or to the vendee's attorneys; and even where no mention of this kind is made in speaking of the title to be produced, yet where provision is made for the return or forfeiture of the deposit it is usual to stipulate that if the title, upon examination, should prove "unsatisfactory," the agreement shall be canceled. It is difficult to announce the exact effect of stipulations of this kind, or to state whether

[26] Coal v. Higgins, 23 N. J. Eq. 308.

[27] Newark Saving Institution v. Jones, 37 N. J. Eq. 449; Delevan v. Duncan, 49 N. Y. 485.

[28] Wheeler v. Tracy, 49 N. Y. Sup. Ct. 208.

[29] Barnard v. Brown, 112 Mich. 452.

[30] Moore v. Appleby, 108 N. Y. 237; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234. Compare Ferry v. Sampson, 112 N. Y. 415.

the power of pronouncing his dissatisfaction is subject to an arbitrary exercise by the party in whose favor it is extended, or exists only where in reason and good conscience he may be dissatisfied. The authorities upon this point are conflicting, and the question may fairly be said to be one of doubt.

In a majority of the most pronounced cases the question has arisen in connection with sales of chattels or the fabrication of articles of a personal nature largely dependent upon skill and ability. In one class of cases it is held that the person to whom this privilege is given has no right to say, arbitrarily and without cause, that he is dissatisfied,[31] while the other class as positively asserts the doctrine that when the agreement is to make and furnish an article to the satisfaction of the person for whom it is intended, he alone is the judge as to whether the article is satisfactory; and that it is not a compliance with the contract to prove that he ought to have been satisfied.[32] In nearly all of these cases it is said that where the refusal to accept is because of dissatisfaction the objection should be made in good faith; yet this is a very difficult matter to determine where the sole arbiter is the objecting party himself, for he may refuse through the merest caprice, and yet not be chargeable with bad faith.

There is no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive; and the weight of authority, as well as reason, would seem to support the doctrine that parties must abide by their contracts as they have made them. If the vendor has agreed to furnish an article that shall be satisfactory to the vendee, it would seem that he constitutes the latter the sole judge of his own satisfaction. Some cases announce a reasonable modification of the rule, to the effect that the dissatisfaction must be real and not feigned, and that the vendee is not at liberty to say he is dissatisfied when in reality he is not—in other words, that his discontent must be genuine;[33] yet the difficulty of arriving at mental processes is so great that the modification as suggested is practically of little

[31] See Daggett v. Johnson, 49 Vt. 345; Manufacturing Co. v. Brush, 43 Vt. 528.

[32] Zaleski v. Clark, 44 Conn. 218; Brown v. Foster, 113 Mass. 136; McCarren v. McNulty, 7 Gray (Mass.), 139; Gibson v. Cranage, 39 Mich. 49.

[33] See Hartford Mfg. Co. v. Brush, 43 Vt. 528.

avail; and even the same class of cases which hold this doctrine also maintain that, while the vendee is bound to act honestly, it is not enough to show that he ought to have been satisfied and that his discontent was without good reason.[34]

It may be said that, where the agreement simply is to produce something that shall be "satisfactory," without indicating the person to whom it shall be satisfactory, the stipulation is doubtful, or that it should be satisfactory to any reasonable person. But this would be doing violence to language; for, as has been well remarked, "when we speak of making a thing satisfactory, we mean it shall be satisfactory to the person to whom we furnish it. It would be nonsense to say that it should be satisfactory to the vendor. It would be indefinite to say it should be satisfactory to a third person without designating the person. It can only be intended that it shall be satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee."[35] And this is the view generally taken.[36]

It has been suggested that the force of the cases last mentioned may be lessened by the fact that questions relative to the title to land are such as are peculiarly within the power and duty of a court to determine.[37] Yet in principle it can make but little difference whether the transaction relates to real or personal property; and so, where the terms of sale provided that if the purchaser, upon examination, should not be satisfied with the title, he need not take the property, it was held that if the purchaser in good faith was not satisfied with the title, he would not be compelled to complete the purchase, notwithstanding the court pronounced the title marketable.[38]

An apparently opposing case will be found among the earlier decisions in New York,[39] where a contract for the purchase of land provided that the purchaser should pay for the same

[34] Daggett v. Johnson, 49 Vt. 345; Lynn v. R'y Co. 60 Md. 404.

[35] Brown, J., in Campbell Press Co. v. Thorp, 1 Law Rep. (Mich.) 645.

[36] McCormick Co. v. Chesroun, 33 Minn. 32; Singerly v. Thayer, 108 Pa. St. 291.

[37] Note by Savage, 25 Am. Law Reg. 19.

[38] Averett v. Lipscombe, 76 Va. 404; Taylor v. Williams, 45 Mo. 80.

[39] Folliard v. Wallace, 2 Johns. (N. Y.) 395.

three months after he should be well satisfied that the title was marketable. Payment was refused on the ground of outstanding title, and the purchaser alleged dissatisfaction. The proof showed that the claim of outstanding title was unsound. Kent, C. J., after demonstrating the untenability of defendant's objection for this reason, then said: "Nor will it do for the defendant to say he was not satisfied with his title without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void;" and at the same time laid down a principle which the courts of New York have since followed on a number of occasions, to wit: "That which the law shall say a contracting party ought, in reason, to be satisfied with, that the law will say he is satisfied with."[40]

§ 301. "Good" title. It has been said that custom makes law. To a certain extent this is true, but the employment of meaningless phrases, however widespread or long continued, should not be made to come within the rule. Analogous to the topic discussed in the last paragraph is the frequent stipulation for the production of a "good" title, or that title may be refused if on examination it shall "not be found good." The word "good," in this connection, notwithstanding its long and frequent use, has no meaning either at law or in equity. Its very employment necessarily implies the existence of such a thing as a "bad" title, and by the rules of grammar indicates that it may be "better." But the term has come into common use and probably will continue to find expression in land contracts, and the question for solution is: When will a purchaser be justified in refusing to accept a conveyance under a contract to produce a "good" title? Undoubtedly what is meant by the parties is a marketable title, and the signification of the term, when employed in a contract of sale, may fairly be said

[40] The principle is affirmed in Brooklyn v. R. R. Co. 47 N. Y. 475; Miesell v. Ins. Co. 76 N. Y. 115, but not with reference to the subject under discussion.

to be equivalent to a marketable title—one free from doubt or palpable defects.[41]

§ 302. **Title as affected by attorney's opinion.** As a general rule an opinion of counsel pronouncing a proffered title doubtful or defective will not justify a purchaser in rejecting same,[42] nor will the fact that the contract provides that title shall first be passed upon by the purchaser's lawyer vary the application of the rule or make the decision of such lawyer a condition precedent to the right of enforcement by the vendor.[43] But if the parties expressly stipulate, as they have a right to do, that the title shall first be presented to the purchaser's counsel for examination and that upon his acceptance only shall the sale become consummate, a rejection by him will justify the purchaser in refusing to proceed, and he may demand back and recover any earnest money that may have been paid.[44]

§ 303. **Claims of title.** While in strict legal contemplation all that a land-owner agrees to sell, or actually does sell, is his specific degree of interest in a parcel of land, yet, for commercial convenience, there is a recognized distinction between an agreement for the conveyance of a specific tract of land and an agreement to simply convey the vendor's right, title and claim thereto. Imperfect titles, claims of title, conflicting and unconsummate equities, always abound in profusion in every locality where land exhibits any considerable degree of activity; and such claims and equities are often made the subject of sale and conveyance. When, therefore, a vendor has bound himself to convey not the land but only his right, title and claim to the land, there is no implication of a covenant that he has a marketable title; nor can the vendee refuse to consummate the agreement by raising an objection to the title offered. If the vendor offers to convey all his claim, whatever it may be, he tenders to the vendee

[41] See Herman v. Somers, 158 Pa. St. 424.

[42] Montgomery v. Land Bureau, 94 Cal. 284.

[43] Vought v. Williams, 120 N. Y. 253.

[44] Allen v. Pockwitz, 103 Cal. 85. In this case there was no stipulation in regard to title but simply that it was to be examined and accepted or rejected by purchaser's attorney, hence the question of marketable or non-marketable title was not presented, but it would seem that even had it been mentioned in the contract it would

the very subject-matter of the contract; the vendee in such case buys at his own risk, and cannot be heard to defend, when called on for the price, that the title offered is defective.[45] So, also, if a vendor does not pretend to have a clear title, but expressly sells such as he has, the vendee will be obliged to accept the same without first requiring the vendor to show a clear title.[46]

§ 304. **Title of record.** The question seems to have been productive of much discussion as to whether a purchaser who has contracted for a record title will be compelled to accept a title depending upon adverse possession under the statute of limitations. Of all known titles to land, beyond a mere naked possession, which are *prima facie* marketable, there is perhaps none recognized by law more doubtful and uncertain than those depending for their validity upon an adverse possession.[47] For this reason such titles are justly regarded with suspicion and accepted with caution; and though they may be, for all practical purposes, indefeasible at law or in equity and as strong as a title by grant, yet, where the contract calls for a title shown by the records, an objection to a title based upon extraneous facts and resting in parol is well taken. The fact that the proposed title is practically unassailable carries no weight in the consideration of a question of this character.[48] It is sufficient that such title is substantially different from the one contracted for, and the motives and fancies of mankind are so various that the law which recognizes the right of parties to make just such contracts as they choose

have made little or no difference for this will, as a rule, be implied in all contracts.

[45] So held where the contract was that the vendor, in consideration of a stated price, agreed to convey all his "right, title and claim" in a certain tract containing five hundred acres, which price vendee agreed to pay, and afterwards the vendor tendered a deed purporting to convey "all his right, title and claim." Herrold v. Blackburn, 56 Pa. St. 103.

[46] Broyles v. Bee, 18 W. Va. 514. It has been held that where the vendor agrees to make a "good and sufficient conveyance, with full warranty" only against his heirs and personal representatives, he is bound only to convey such title as he has; but that the rule would be otherwise where his agreement is for a good and sufficient conveyance. Thompson v. Hawley, 14 Ore. 199.

[47] Brown v. Cannon, 5 Gilm. (Ill.) 182.

[48] Noyes v. Johnson, 139 Mass. 436.

will not call upon a man who has contracted to purchase one thing to explain why he refuses to accept another.[49] To compel a purchaser to take that which he never agreed to accept would be manifestly unjust, no matter what might be its character or value.

It is of frequent occurrence, in those states where title is deraigned from the federal government, to stipulate for an abstract showing a devolution of title from the United States to the person proposing the same. In the later-formed states this is particularly the case. The same general principles we have just been considering apply with equal force to stipulations of this character. As where the vendor agreed "to show and present a perfect chain of title to said property from the United States government," and did present an abstract showing a government patent with successive conveyances connecting his title, yet it appearing further that the land covered by said patent had been previously confirmed in the heirs of a deceased person by deed of confirmation of the territorial governor, pursuant to act of congress, and that in consequence the United States possessed no interest in the land which it could sell or patent, it was held that the patent was void as a conveyance and colorable only; and that, notwithstanding that such patent might be resorted to in connection with payment of taxes, possession, etc., as color of title, it did not show the title intended by the language of the parties. That the title thus shown was a good defensive title was not denied; but the court ruled that the only rational construction that could be placed upon the stipulation of the agreement required the production of a chain of title from the United States government which should be perfect, and that this could only mean the production of the successive conveyances, commencing with the government patent, each being a perfect conveyance of the title, down to and including the person proposing the same. To have complied with the stipulation it would have been necessary to have shown a title derived through the heirs of said deceased person; but the claim being based upon the invalid patent, which was simply a link in a colorable chain of title, was not what the purchaser had bargained for.[50]

[49] Page v. Greeley, 75 Ill. 400.

[50] Payne v. Markle, 89 Ill. 66. In this case the questions arose after conveyance and upon the abstract, but the principle applies to an executory contract as well.

§ 306. **Title by adverse possession and limitation.** A title deducible of record, must, under our laws, be more reliable and consequently more desirable than one depending upon a variety of extrinsic circumstances to be established by parol evidence. This is a generally recognized principle in all real estate transactions; and intending purchasers are usually tenacious upon this point, and observant to see that the stipulations of the contract embody provisions calling for the production of such title. Indeed, this is one of the vital points of the contract, and a purchaser who desires such a title should have that fact duly incorporated.[51] But where the purchaser does not see fit to stipulate as to the character of the title he is to receive, or if no reference is made thereto, while the obligation of the vendor to furnish a marketable title would be raised by implication, there would be no obligation on his part to furnish a record title.

A purchaser may be compelled to take a title founded on adverse possession under color of title, if there is no reasonable doubt of the superiority of such title,[52] but not where there are circumstances which may prevent the possession from being adverse.[53] Nor does it seem to be essential that the adverse title should be based upon color of title;[54] it is sufficient if it is of such a character as shall assure to the vendee a quiet and peaceable possession of the property.[55]

[51] A purchaser entitled under his contract to a title of record is not bound to accept a title by adverse possession depending upon a long and difficult investigation of facts, although it may be good. Noyes v. Johnson, 139 Mass. 436.

[52] Crowell v. Druley, 19 Ill. App. 509. A purchaser may be compelled to accept a title founded on an adverse possession for ninety years. Abrams v. Rhoner, 44 Hun (N. Y.), 507; Shriver v. Shriver, 86 N. Y. 575. Specific performance will be enforced where the title tendered is based on an adverse possession and payment of taxes for nearly sixty years, there being no outstanding minorities which could be set up in support of the paper title against which the adverse possession was held. Ottinger v. Strasburger, 33 Hun (N. Y.), 466. And see Murray v. Harway, 56 N. Y. 337; Ballou v. Sherwood, 32 Neb. 666; Moore v. Luce, 29 Pa. St. 260; Clancey v. Houdlette, 39 Me. 451; Luman v. Hubner, 75 Md. 268.

[53] Shriver v. Shriver, 86 N. Y. 575.

[54] Campau v. Lafferty, 50 Mich. 114.

[55] Barnard v. Brown, 112 Mich. 452; O'Connor v. Huggins, 113 N. Y. 521; Bicknell v. Comstock, 113 U. S. 149; Hodges v. Eddy, 41 Vt. 485.

§ 307. **Ancestral titles—Descent.** Title by descent was formerly considered the superior title, and under the peculiar conditions which attended the devolution from ancestor to heir was probably more certain and indefeasible than that acquired by any of the modes of purchase except the original grant from the sovereign. But in the United States this order has been reversed; and while a title so derived is in every way as effectual as one obtained by purchase, it is often attended with so many doubtful incidents that such titles are now frequently regarded with suspicion and accepted only with caution.

Where proper proof of heirship is made, and particularly where an adjudication has been had in probate, and it satisfactorily appears that the title of the heir is unembarrassed by ancestral debts or unfulfilled obligations, no serious objection will usually lie; but in the absence of any proper showing a purchaser is justified in refusing the title unless by some agreement the defect of proof has been waived. An objection is well taken where there is at least a probability that certain persons whose deed is tendered to make a title are not the sole and only heirs of their ancestor, and a purchaser will not be required to accept a title so doubtful.[56]

§ 308. **Spurious deeds.** A purchaser has a right to demand a valid title by a regular derivation of right from some undoubted and unquestioned source; and where the title as exhibited depends upon spurious deeds or other muniments whose genuineness and authenticity is questioned, the purchaser may well object to a consummation of the trade until by proper proof the objection is shown to be untenable. An ancient deed will usually be received without proof of execution when free from suspicion upon its face, and when offered to support a title concurrent with possession; but where a deed is without acknowledgment or other proof, or is impeached by other and extraneous testimony, unless the possession of the claimant thereunder has been of such a character and continued for such length of time as to create a valid title by mere force of adverse possession, the title so offered is so far uncertain that a court of equity would refuse to lend its aid to enforce the contract, while the questions

[56] Walton v. Meeks, 41 Hun (N. Y.), 311.

thus raised being essentially questions of fact should be submitted to a jury for determination.[57]

§ 309. **Hazard of litigation.** A purchaser will never be compelled in equity to accept a title that will expose him to the hazard of litigation. The title should not only be sufficient to enable him to hold the land, but to hold it in peace; and where the circumstances attending the devolution of title are such as to cast a doubt upon its character, an objection for this reason is well founded.[58] A purchaser in every sale, unless he specially stipulates to the contrary, has a right to expect that he will acquire a valid and unassailable title, and the law presumes that he purchases with that object in view. He should not, therefore, be left upon receiving his deed to the uncertainty of a doubtful title or the hazard of a contest with other parties, which may seriously affect the value of the property if he desires to sell the same.[59]

But while the foregoing propositions have become established beyond dispute, it must nevertheless appear that the objection is not founded on mere caprice or unsubstantial

[57] See Seymour v. De Lancey, Hop. Ch. (N. Y.) 436.

[58] Moore v. Appleby, 108 N. Y. 237; Swaney v. Lyon, 67 Pa. St. 436; Herman v. Somers, 158 Pa. St. 424. Tillotson v. Gesner, 33 N. J. Eq. 313. This was a bill for specific performance. The complainant and defendant had agreed to exchange lands. It was objected, *inter alia*, that complainant held her title from her son-in-law by a voluntary conveyance made to defraud his creditors and voidable by them; that a judgment for deficiency was docketed against him a few days before the conveyance from him to complainant was made; that the title was assailable by his creditors. *Held*, where there is a conveyance of land, voluntary on its face, made by a defendant just before a judgment for a large sum is rendered against him, which would be a lien on the land if such conveyance had not been made, and the evidence fails to show by strong proof that it was made in good faith and for a valuable consideration, the specific performance of an agreement with the vendee for the purchase of the land will not be enforced.

[59] Jordan v. Poillon, 77 N. Y. 518; Moore v. Williams, 115 N. Y. 586; Herman v. Somers, 158 Pa. St. 424. A purchaser of real estate cannot be required to accept a conveyance thereof where, because of a mistake in the description of the land in a former conveyance through which the vendor holds, the title as to a part of the land is so doubtful that it may expose the vendee to litigation on the part of a third person, or where for such reason the title is not marketable. Smith v. Turner, 50 Ind. 367; Linn v. McLean, 80 Ala. 360. A purchaser is justified in refus-

trifles;[60] hence a bare possibility that the title may be affected by the existing causes which may subsequently be developed when the highest evidence of which the case admits, amounting to a moral certainty, is given that no such cause exists, is not to be regarded as a sufficient ground upon which to found an objection, or for inducing a court to decline to compel a purchaser to perform his contract.[61]

It is further to be observed that the doctrine that equity will not compel a party to accept a title which may be exposed to litigation does not apply when no question of fact is involved, and all parties in interest are before the court.[62]

§ 310. **Pending litigation.** If a purchaser may refuse to consummate a sale of land where it reasonably appears that its acquisition may subject him to the hazard of a law suit, it follows with much stronger reason that an objection will lie where the title to the property forming the subject-matter of the sale is actually involved in litigation,[63] or where proceedings of a legal character are then pending to subject the property to any liens, servitudes or burdens. Thus, the pendency of condemnation proceedings is such a defect in title that the vendee is not bound to take the property.[64] And generally, if an action has been commenced which apparently affects the title, and the pleadings state a cause of action, such a title is not marketable and the purchaser will not be compelled to accept it.[65] And it seems, that where such a con-

ing to take a title founded on partition proceedings to which remainder-men were not made parties. Moore v. Appleby, 108 N. Y. 237.

[60] Webb v. Chisholm, 24 S. C. 487.

[61] As where purchaser refused to consummate a sale and sued for the recovery of money paid by him on the execution of the contract on the ground that defendant inherited the property from C., who died within three years intestate; that the administration of his estate had not been closed and plaintiff would have to take the property subject to the debts of the intestate, if there should be any after his personal estate was exhausted; also the possibility of the discovery of a will within four years after death, which would govern the disposition and render a conveyance void. *Held*, that to entitle plaintiff to relief it was necessary for him to show debts, and an insufficient personal estate left by C. Moser v. Cochrane, 107 N. Y. 35. And see Webb v. Chisholm, 24 S. C. 487.

[62] Cheseman v. Cummings, 142 Mass. 65.

[63] Linn v. McLean, 80 Ala. 360.

[64] Cavenaugh v. McLaughlin, 35 N. W. Rep. (Minn.) 576.

[65] Simon v. Vandeveer, 155 N. Y.

dition is disclosed the purchaser may found his objections wholly upon the record. He is not required to go outside and investigate the evidence upon which the action is based and then determine whether it can be maintained. It is enough that action, apparently well laid, is pending.[66]

§ 311. **Unsatisfied judgments.** If an examination of the title discloses the fact that there are subsisting judgments outstanding against the vendor which constitute liens on the land, the purchaser may properly object to the title for that reason, and may successfully defend a suit for specific performance or an action for the purchase money. Such a title is clearly defective.

But while the authorities are united in declaring that equity will not compel a vendee to take an imperfect or defective title, yet cases of high authority are to be found in which a pecuniary charge against which adequate security has been given has been held not to constitute a defect of title. Thus, where a vendor contracted to sell a house and lot, the fact that at the date of the contract there was a judgment against the vendor from which he had entered an appeal, and given bond with ample security to pay the amount of the judgment, with costs, in case he should fail to prosecute his appeal with effect, was held not to constitute a defect or incumbrance upon the title which would prevent a specific execution of it.[67]

Usually, however, a purchaser of land who is entitled under his contract to a perfect title cannot be compelled to perform his agreement, if the property purchased be subject to judgment lien under which he is obliged to take the risk of having the same afterward resorted to for the payment of the judgment, notwithstanding that a *supersedeas* bond may have been given. A bond may be ample security when given and yet prove worthless at the end of a protracted litigation. Nor will the fact that the vendor or judgment debtor is possessed of ample property which may first be exhausted before subjecting the property sold be a sufficient answer to an objection for this reason; for, while such may be the general rule, yet

377; compare Aldrich v. Bailey, 132 N. Y. 85.

[66] Simon v. Vandeveer, 155 N. Y. 377.

[67] Brewer v. Herbert, 30 Md. 301; Tiernan v. Roland, 15 Pa. St. 441; Thompson v. Carpenter, 4 Pa. St. 132.

it may not be certain that equity would compel the judgment creditor to first exhaust the property remaining in the judgment debtor before resorting to that acquired by the purchaser, and in any event he should not be required to assume either the risk or expense of prosecuting an action to compel the judgment creditor to seek satisfaction out of other property of the judgment debtor.

An objection for this reason, therefore, must usually be held to be well taken; and such objection will be sustained unless it is possible to protect the purchaser against the hazard of loss or inconvenience by decree providing for the application of the purchase money to the discharge of the judgment, or some other equally effective method.[68]

Where the judgment is very old, or is apparently barred by limitation, the foregoing remarks may require some qualification, for lapse of time, in the absence of repelling evidence, is sufficient in law, without more, to raise a presumption of payment.[69] Yet, being merely a presumption, it may be rebutted, and, as between the parties, proof of intervening circumstances is frequently permitted to show that the debt is still due. Usually, however, the statutes of limitation are strictly construed in favor of third persons for the purpose of quieting titles, and judgments upon which no attempt has been made for enforcement for a period of twenty years will be presumed to have been satisfied, and this doctrine prevails alike at law and in equity.

§ 312. Outstanding incumbrances. Incumbrances have been lucidly yet briefly defined as any rights to interests in land which may subsist in third persons, to the diminution of the value of the land, and not inconsistent with the passing of the fee of same by deed.[70]

An outstanding incumbrance of any kind, for which no provision has been made in the contract of sale, forms an insuperable objection to the consummation of the agreement. Thus, the existence of a mortgage upon the property relieves the vendee from the obligation of performing his part of the

[68] Walsh v. Barton, 24 Ohio St. 28.

[69] Rhodes v. Turner, 21 Ala. 210; Beekman v. Hamlin, 19 Ore. 383; Olden v. Hubbard, 34 N. J. Eq. 85; Ray v. Pearce, 84 N. C. 485.

[70] 1 Bou. Law Dict. 784; Huyck v. Andrews, 113 N. Y. 81.

agreement unless upon objection made the mortgage is canceled; and the fact that the mortgage was recorded, and that the vendee therefore had notice of the same, is immaterial where the true meaning and import of the contract is to convey an indefeasible estate.[71] So, also, if at the time of the contract there is a lease outstanding which was unknown to the vendee, he is not bound, but may rescind the contract, the vendor not being in a situation to give a perfect title.[72] Nor will a purchaser be compelled to accept a title which may be incumbered with a condition, it being doubtful whether the condition is or is not valid.[73] And generally, if from the vendor's negligence or default the property becomes incumbered by judgments, taxes, forfeitures or otherwise before the time for conveying the same or before he offers to perform his contract, he cannot insist on performance by the other party until he relieves the title from such subsequent incumbrances.[74]

A restriction upon the power of alienation, or a reservation to a former owner of a right of repurchase for a certain time, is an incumbrance which diminishes the value of the title; and a purchaser who has contracted to buy the premises without notice of the existence of such an incumbrance will not be compelled to take the property subject thereto, or at least not without a proper allowance therefor.[75]

Where adjoining owners have by grant imposed mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings, such covenants are, in effect, reciprocal easements, and where the title tendered is burdened by such a covenant restricting the use of a certain portion of an entire lot frontage so as to prevent building thereon, it is an incumbrance, and

[71] If in such case the vendee has paid any part of the consideration money, he may disaffirm the contract and recover back the money which he has paid. Judson v. Wass, 11 Johns. (N. Y.) 525.

[72] Tucker v. Woods, 12 Johns. (N. Y.) 190. Or if it was known that the property was subject to a lease, yet if no mention was made that the tenant had the right to remove a valuable building from the land, the purchaser would not be compelled to complete the purchase. Beckenbaugh v. Nally, 32 Hun (N. Y.) 160.

[73] Post v. Bernheimer, 31 Hun (N. Y.) 274; Adams v. Valentine, 33 Fed. Rep. 1

[74] Cooper v. Tyler, 46 Ill. 462.

[75] Winne v. Reynolds, 6 Paige (N. Y.) 407.

the vendee will be justified in refusing to complete his purchase.[76] The existence of a party wall agreement whereby the owner of a lot is to pay a portion of the cost of the wall in the event of the use of same by him, is a covenant and an incumbrance which runs with the land and is binding upon his grantee.[77]

Where there are trifling incumbrances upon the title[78] which were known to the vendee at the time he contracted to purchase, it has been held that a specific performance will be decreed without compensation;[79] and where the purchaser enters into possession under the contract, knowing that there is a slight defect in the vendor's title or a slight incumbrance upon it, he will be held in most cases to have waived it.[80] The mere fact of entry does not of itself, however, amount to waiver; there must be other circumstances, such as show that the vendee had a knowledge of defects, and intended to accept such title as could be made, relying upon the covenants for redress.[81]

If a purchaser has contracted for a title free from all incumbrances he cannot be compelled to accept a title wherein the use of the property or any part thereof is restricted to specific purposes, whether such restriction is inserted in the deed tendered or appears in some of the other conveyances that constitute the chain of title. So, too, if he has agreed to take the land subject to restriction he cannot be compelled to consummate the purchase when the so-called restriction in fact creates a condition as distinguished from a limitation or covenant. It is true that courts lean against forfeiture, and whenever possible will construe words as creating a covenant or restriction instead of a condition, yet they cannot ignore the legal signification of language; and where, in such case, the restrictive clause creates a condition, it constitutes a fatal defect in the title. Contracts for the sale of urban property are frequently made with reference to the use of the land, taken in connection with adjoining lands, wherein the vendee

[76] Wetmore v. Bruce, 118 (N. Y.) 319.

[77] Burr v. Lamaster, 30 Neb. 688.

[78] As the reservation of a barleycorn rent, or anything else which is merely nominal.

[79] Winne v. Reynolds, 6 Paige (N. Y.) 407.

[80] Coray v. Mathewson, 44 How. Pr. (N. Y.) 88.

[81] Jones v. Taylor, 7 Tex. 240.

stipulates to accept a title which shall be subject to a servitude restricting the mode of use of the land to be conveyed. Giving proper effect to such a contract the vendee would be entitled to have a clear title, free from all incumbrances except the servitude; but he would not be required to accept a title by which the whole estate becomes liable to forfeiture in case the part subjected to the restricted use is ever appropriated to a different use.[82]

§ 313. **Continued—Unsatisfied mortgage.** The mere existence of an unsatisfied mortgage, or the disclosure of this fact by the public records, does not of itself constitute a valid ground of objection to a title, provided the mortgage is incapable of enforcement against the land; and where the right of entry or foreclosure has been cut off by the lapse of time, such mortgage will ordinarily be regarded as of no more effect than if it had never been executed. In some states this is a matter dependent upon statute, which fixes the period during which foreclosure is allowed; but independent of any statutory enactment courts will, in the exercise of a lawful prerogative, make certain presumptions of payment.[83] The presumption of payment founded on the lapse of time and other circumstances does not always proceed on the belief that the thing presumed has actually taken place, but is raised for the purpose and from a principle of quieting the possession. These presumptions are founded in substantial justice and the clearest policy, and prevail both in courts of equity and law. The presumption resolves itself into this: that a man will naturally enjoy what belongs to him; and is a principle of decision adopted and sanctioned by a succession of learned judges in the courts of every state in the Union.

Hence it is, where the mortgagee has never entered under his mortgage, or taken steps to foreclose the same, and twenty years or more have been suffered to elapse since the maturity of the debt, the presumption becomes very strong that the mortgage has been discharged by payment or otherwise,[84] and this presumption becomes greatly intensified

[82] Jeffries v. Jeffries, 117 Mass. 184; Adams v. Valentine, 33 Fed. Rep. 1.

[83] See Van Vleet v. Blackwood, 39 Mich. 733; Jackson v. Wood, 12 Johns. (N. Y.) 242.

[84] Miller v. Smith, 16 Wend. (N. Y.) 463; Van Vleet v. Blackwood, 39 Mich. 733.

where successive grantees have had the undisturbed possession of the premises during this interval; and if a party, with knowledge of his rights, will sit still, and without asserting them permit persons to act as if they did not exist, and to acquire interests and consider themselves as owners of the property, there is no reason why the presumption should not be raised.[85]

It has been held, however, that this presumption may be rebutted by satisfactory proof; as, that interest has been paid within twenty years; the continued absence from the country of the obligee; the continued insolvency of the obligor, or other strong circumstances showing non-payment or cause for forbearance.[86] But the statute of limitations in most cases will come in to aid the presumption of payment by interposing a bar to any right of action.

§ 314. Unpaid taxes. A tax or assessment imposed by lawful authority is an incumbrance upon title until satisfied, and unless the vendor will cause same to be discharged the vendee is under no obligation to accept a deed or complete the purchase.[87]

§ 315. Unreleased dower rights. No small amount of the litigation arising in connection with titles is occasioned by the assertion of claims for dower by women, who, at some stage in the history of the title, have sustained marital relations toward some of the parties having, or assuming to have, an interest in the land. Such claims are more frequently based upon the fact of non-joinder in the deeds of the husband, yet instances occur where the sole merit of the claim lies in the fact that the wife, while properly uniting with the husband in execution, has, through the neglect of the certifying officer, failed to comply with statutory requirements relative to acknowledgment. As the acknowledgment was formerly regarded as the essential and effective act whereby a wife estopped herself from afterwards claiming dower, such claims have often been successfully urged. It is important, therefore, that the title be carefully scrutinized for defects of this character; and where a possible dower claim is apparent an

[85] Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545.

[86] Hale v. Pack, 10 W. Va. 152.

[87] Morange v. Norris, 3 Abb. App. Dec. 320.

objection should be lodged, and if the objection is not overcome by satisfactory evidence that no such claim can arise, or if presented cannot be maintained, or unless the objection is removed by a release of the dower right, the title should be rejected unless the purchaser is willing to assume the risk.

There would seem to be a misconception in some of the earlier cases with respect to the real nature of the inchoate right of dower. It is now well settled, however, that such right is not a mere possibility or contingency, which is to be deemed an incumbrance only when it becomes consummate by the death of the husband, but it is from the time when it attaches, an actual lien—a potential incumbrance.[88] Indeed, it has been held that it is more than a mere lien and constitutes a substantial right of property.[89] In any event it is paramount to all conveyances, contracts or incumbrances made by the husband during the coverture, and calls for the utmost scrutiny in the examination of a title.

The tendency of recent decisions is to discourage stale claims for dower, and to place claims of this character strictly within the letter of the law in respect to the limitation of actions and repose of titles. Hence, where the law makes provision for the quieting of title by adverse possession for a limited period, if such possession is taken and maintained under claim and color of title made in good faith, the remedy to enforce the right of dower has been held to be embraced within the provisions of such law; and a widow must pursue her remedy within the time therein prescribed, or her claim will be effectually barred as against a party in possession and complying with such law.[90] But little seems to have been done to remedy the evils of stale dower claims by express enactments, but the courts, as just stated, have applied the limitation laws to claims of this nature. As a general rule it may be said that the recovery of dower is barred by the

[88] Bigelow v. Hubbard, 97 Mass. 195.

[89] Shell v. Duncan, 31 S. C. 547.

[90] So held in Brian v. Melton, 125 Ill. 647, under a law providing that every person in the actual possession of lands under claim and color of title made in good faith, and who shall continue in possession for seven successive years and during said time shall pay all taxes assessed on the land, shall be held and adjudged to be the legal owner thereof. And see Owen v. Peacock, 38 Ill. 33.

statutory limitations that apply in cases of actions of ejectment,[91] and when this can be satisfactorily shown the ground of the objection is, of course, removed.

§ 316. **Dowress' death.** Where objection is made to the vendor's title for the reason that the wives of any of the former owners failed to relinquish their dower, proof of their death prior to the sale will obviate such objection; and in like manner proof of the death of the husband of a dowress more than twenty years before will be sufficient to show that her dower is barred, and hence no incumbrance.[92]

§ 317. **Title subject to defeasance.** Unless he stipulates so to do, a purchaser will not be compelled to accept a title subject to be defeated. Thus, he is under no obligation to take a title clouded by a right of reverter in the heirs of the original grantor by reason of a diversion from the uses limited in his conveyance.[93]

§ 318. **Trusts and other equities.** Not only should the title disclosed be a legal title, but it should also be unhampered by trusts or other equities; and where the devolution shows that it originated in trust, no matter how long it may have continued unassailed, it cannot be said to be marketable, and an objection may properly be lodged against it. The reason for this is that, as a general rule, length of time is no bar to a trust clearly shown to have once existed;[94] and while this rule is not without its appropriate qualifications, yet as long as the relation of trustee and *cestui que trust* is acknowledged, the lapse of time can constitute no bar to the granting of proper relief for the parties beneficially interested. If there has been an open denial or repudiation of the trust, and this can be shown to have been brought home to the knowledge of the parties beneficially interested, so as to compel them to act as upon an adverse title, or when time and long acquiescence have obscured the nature and character of the trust, or where

[91] Beebe v. Lyle, 73 Mich. 114; Winters v. DeTurk, 133 Pa. St. 359.

[92] Lyman v. Gedney, 114 Ill. 388.

[93] Nor is the case affected by the fact that the legislature attempted to authorize an absolute disposition by the original grantee, notwithstanding the limitation. Universalist Society v. Dugan, 65 Md. 460.

[94] Gratz v. Prevost, 6 Wheat. (U. S.) 481.

the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, a court of equity will frequently refuse to grant relief upon the ground of lapse of time and its inability to do complete justice. So, too, as length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of the original transaction, it operates, by way of presumption, in favor of the legal title and against imputations that may be put upon it.[95]

It is a well-established rule, however, that every purchaser of trust property with notice of the trust takes it charged with and subject to that trust.[96] The vested interests of the beneficiaries cannot be impaired or destroyed by the voluntary act of the trustee,[97] and the trust will follow the land in the hands of any person to whom he may convey it with knowledge.[98]

§ 319. Equitable estates—Legal title outstanding in trustees. An equitable estate is just as properly the subject of barter and sale as a legal estate vested in possession, but the law presumes that the contract refers to a legal title in all cases where the circumstances do not rebut such presumption; and a purchaser who has contracted for a marketable title may justly object to an equity, however strong. Nor does the fact that the vendor possesses the entire beneficial use of the property, or that the outstanding legal title is vested in trustees who may be compelled to convey at any time, in any way alter the case. Until such outstanding legal title is extinguished the sale cannot be enforced against the vendee.[99]

§ 320. Title acquired in violation of trusts. A title which

[95] The lapse of forty years and the death of all the original parties deemed sufficient to presume the discharge and extinguishment of a trust, proved to have once existed by strong circumstances; by analogy to the rule of law, which after a lapse of time presumes the payment of a debt, surrender of a deed and extinguishment of a trust when circumstances require it. Prevost v. Gratz, 6 Wheat. (U. S.) 481.

[96] Carpenter v. McBride, 3 Fla. 292; Kent v. Plumb, 57 Ga. 207; Gale v. Mensing, 20 Mo. 461; Talbott v. Bell, 5 B. Mon. (Ky.) 320; Ryan v. Doyle, 31 Iowa 53; Ham v. Ham, 58 N. H. 70.

[97] Shepard v. McEvers, 4 Johns. Ch. (N. Y.) 136.

[98] Gray v. Ulrich, 8 Kan. 112; Coble v. Nonemaker, 78 Pa. St. 501.

[99] Murry v. Ellis, 112 Pa. St. 485.

discloses the fact that some of the prior vendors have violated some fiduciary trust, even though such fact may be only inferential, is for that reason defective and may properly be objected to. As where it is shown that a trustee has purchased at his own sale, either directly or indirectly, a purchaser from him would not be protected as one buying in good faith and without knowledge of the breach of trust; and the title being voidable by those whom the trustee was bound to protect, should be rejected by the purchaser.[1]

It is true that a title derived through the violation of a trust may in time ripen into an indefeasible estate, and that continuous adverse possession may be sufficient to preclude those who otherwise might have asserted superior equities; but while courts will ordinarily refuse to lend their aid to assist a defrauded party who fails to assert his rights within a reasonable time, it is nevertheless nearly impossible, in a case of this kind, to say what is a reasonable time, or with accuracy to determine when the bar of the statute has fully intervened. A very great length of time might, perhaps, be conclusive; yet while twenty years is usually named as the shortest period which a court of equity would be bound to consider as an absolute bar, there are cases where sales have been set aside even after that time.[2] In all these cases diverse and varied circumstances operated to affect the judgment of the court; but they all show that no particular time can be regarded as necessarily conclusive, and that a purchaser receiving a deed in ignorance of the occasion or circumstances of the delay

[1] People v. Board of Stockbrokers, 92 N. Y. 98. In this case the examination of the title showed two deeds, which constituted links in the chain, from an executor to a third person, and from the latter back to the executor, under whom, as an individual, the vendor claimed. The deeds were dated within four days of each other, and were recorded upon the same day. No accounting or settlement of the executor had been had, and no ratification of the transfer by those interested under the will was proved. *Held*, that the title was defective, as it appeared that the conveyances were but one transaction, the executor acting in the double capacity of seller and purchaser, and therefore the title was voidable at the election of the beneficiaries named in the will; also, that the lapse of time, it being less than twenty years, was not conclusive upon them. And see Wormley v. Wormley, 8 Wheat. (U. S.) 449.

[2] In Hatch v. Hatch, 9 Ves. (Eng. Ch.) 292, a sale was set aside after

would run the risk of an adverse decision or hold at the best only a doubtful title. Infancy, ignorance, concealment or misrepresentation may come in to explain and excuse the delay and prevent it from amounting to acquiescence.

§ 321. **Party-walls.** The practice of economizing space and expenditure in populous cities by the erection of party-walls is of very ancient origin and almost universal observance. Their use has the effect to create cross-easements on the lands of the respective adjoining proprietors which become appurtenant to their several estates and pass to their respective assignees by any conveyance that may be effectual to transfer the land itself.[3] Purchasers from such parties take with constructive, if not actual, notice of the party-wall agreement, and are presumed to have assumed the burdens as well as the benefits which are incident to it.[4]

Yet while it is true that the erection of a party-wall creates a community of interest between the neighboring proprietors, there is no just sense in which the reciprocal easement for its preservation can be deemed a legal incumbrance upon the property.[5] The benefit thus secured to each owner is not converted into a burden by the mere fact that it is mutual and not exclusive.[6] It would seem, therefore, that where land is sold and at the time is improved by buildings, the buildings forming the inducement to the sale, the fact that the exterior walls are party-walls will not be permitted to be urged as an objection to the consummation of the contract by the vendee; nor

twenty years. In Dobson v. Racey, 3 Sandf. (N. Y.) Ch. 66, after twenty-seven years.

[3] Hart v. Lyon, 90 N. Y. 663; Brooks v. Curtis, 50 N. Y. 639; Thompson v. Curtis, 28 Iowa 229; Ingalls v. Plamondon, 75 Ill. 123; Standish v. Lawrence, 111 Mass. 111. It has been held that a wall between two buildings of adjoining owners, used as a common wall for twenty years, becomes a party wall, whether equally upon the lots of each or wholly upon the lot of one owner. See McVey v. Durkin, 136 Pa. St. 418.

[4] Roche v. Ullman, 104 Ill. 1; Main v. Cumston, 98 Mass. 317; Rindge v. Baker, 57 N. Y. 209; Rogers v. Sinsheimer, 50 N. Y. 646; Thompson v. Curtis, 28 Iowa 229.

[5] Mohr v. Parmelee, 43 N. Y. Sup. Ct. 328; Hendricks v. Stark, 37 N. Y. 111. But where a party wall rests on land otherwise unimproved with an agreement that it shall be paid for when used, this would create an incumbrance. See Burr v. Lamaster, 30 Neb. 688.

[6] Partridge v. Gilbert, 15 N. Y. 601.

will such party-walls be considered as such an easement or incumbrance upon the premises as will relieve a vendee from his contract to purchase them, although he was ignorant that the walls were party-walls when he made the contract. If there has been no positive representation of their condition or character the failure of the vendee to inform himself on the subject indicates his indifference as to the particular character of the walls, and shows that he was content to buy without being at the trouble of examination or inquiry. This omission, may be evidence of his own indiscretion and want of caution but cannot be imputed as a wrong to the vendor when he has neither done nor said anything to mislead him. In such a case there would be no failure of any substantial inducement to the contract.[7]

§ 322. **Unopened streets.** A vendee is entitled to all of the land bargained for, and will not be forced to accept a lot whose area is diminished by a street laid out on a city plan as running through the property, the existence of which was unknown to him when the contract was made.[8] This is in accordance with the principle that a vendee, without knowledge of any defect in title when the agreement was executed, is not compelled to accept a doubtful title or one that will probably require a lawsuit to establish its validity; and where the agreement calls for a marketable title or a title free from incumbrances, an objection may properly be made for this reason, and the existence of the street will constitute an incumbrance or restriction upon a portion of the lot sufficient to bar the vendor from a decree in his favor.[9]

§ 323. **Clouds upon title.** As has been stated, unless the vendee has otherwise agreed it is his undoubted right to demand a "clear" title; and if obscurations appear thereon he may reject it for that reason. A "cloud" consists of a deed, lien, charge or incumbrance of any kind which casts a shadow upon the title, regular and apparently valid upon its face, but in fact irregular and void from circumstances which have to be proved by extrinsic evidence.[10] If the invalidity plainly

[7] Hendricks v. Stark, 37 N.Y. 106.

[8] Peck v. Jones, 70 Pa. St. 83; Kyle v. Kavanagh, 103 Mass. 356.

[9] Appeal Sav. Bank of Pittsburgh, 3 Atl. Rep. 821.

[10] Murphy v. Mayor, etc., of Wilmington, 10 Houst. (Del.) 108; Crooke v. Andrews, 40 N. Y. 547; Sanxay v. Hunger, 42 Ind. 44; Davidson v. Seegar, 15 Fla. 671.

appears on the face of the instrument,[11] or, although not apparent on the writing, if it is shown by any of the preliminaries which attend it, or in any of the links which connect it with the title,[12] so that no lapse of time nor change of circumstances can weaken the means of defense, such an instrument does not, in a just sense, even cast a cloud upon the title or diminish the security of the owner of the land;[13] for the rule is well settled that such an instrument can work no mischief, and that no occasion arises for equitable interference for its removal or cancellation.[14]

On the other hand, anything which, if asserted by action and put in evidence, would compel the production of defendant's title is a cloud.[15] Anything which may injuriously affect title, or may be vexatiously used against the owner of such title, properly comes under the same definition;[16] and this will apply to all matters where the invalidity can only be made to appear by extrinsic evidence.[17] The matters which go to constitute a cloud are such as are usually enumerated under the head of defects of title, and may consist of agreements for conveyance, void because of extrinsic facts;[18] a certificate of sale under a void levy;[19] a sale made under a mortgage with power after the payment of the debt;[20] a deed made without

[11] R. R. Co. v. Schuyler, 17 N. Y. 599; Sloan v. Sloan, 25 Fla. 53.

[12] Fonda v. Sage, 48 N. Y. 173; Griswold v. Fuller, 33 Mich. 268. As where title is deduced through a judicial sale, where the proceedings which were the basis of such sale, and upon which the validity of the adverse title depends, are shown to be void for jurisdictional defects. Florence v. Paschal, 50 Ala. 28; Hatch v. City of Buffalo, 38 N. Y. 276.

[13] R. R. Co. v. Schuyler, 17 N. Y. 599; Bogert v. City of Elizabeth, 27 N. J. Eq. 568.

[14] Fonda v. Sage, 48 N. Y. 173; Cohen v. Sharp, 44 Cal. 29.

[15] Lick v. Ray, 43 Cal. 83.

[16] Dull's Appeal, 113 Pa. St. 510; Fonda v. Sage, 48 N. Y. 173; Martin v. Graves, 5 Allen (Mass.), 661.

[17] Douglass v. Nuzam, 16 Kan. 515; Sanxay v. Hunger, 42 Ind. 44; Alden v. Trubee, 44 Conn. 455; Daniel v. Stewart, 55 Ala. 278; Crooke v. Andrews, 40 N. Y. 549.

[18] As the record of an agreement for sale upon condition, with no notification of its acceptance or compliance with same. Sea v. Morehouse, 79 Ill. 216. Or agreement not accepted in time but afterwards recorded. Larmon v. Jordan, 56 Ill. 204.

[19] Shannon v. Erwin, 11 Helsk. (Tenn.) 337; Stout v. Cook, 37 Ill. 283.

[20] Redmond v. Packenham, 66 Ill. 434.

authority;[21] a mortgage paid but not released,[22] or one given without consideration.

§ 324. **Purchase with notice of defects.** It has been held that, where a purchaser knows when he makes his contract that there is a defect in the title, and that it will take considerable time to remove it, or acquires this knowledge after his purchase and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract, he cannot afterwards complain.[23] Frequently the act of taking possession with knowledge of defects will be held to be a waiver of the right to object for that reason.[24]

§ 325. **Variance and discrepancy—Flaws.** It will not infrequently happen that an examination of the title discloses an apparent defect of title in the nature of a flaw, but which is not so in fact, the apparent flaw having been occasioned by an imperfect designation or misnomer. Thus, where a deed to William Harmon is followed by a conveyance from William Herman, there is an apparent break in the chain unless other evidence is produced to show the identity of person. There can be no doubt that a title disclosing such a state of facts is objectionable for that reason; and notwithstanding the names may stand for and represent but one person, the variance is of such a character as to raise grave doubts, while the defect would clearly be a violation of the terms of an agreement to furnish a clear title deducible of record.

In construing deeds of this character, however—that is, where a party takes under a misnomer, but conveys by his proper name—courts are ever inclined to grant the widest leniency; for, in the great influx of foreign-speaking population which the United States is constantly receiving, mistakes must occur in adapting to the English forms of pronunciation foreign names and the spelling of the same; hence it has been held that a deed to Mitchell Allen followed by a deed from Michael Allaine is not a fatal variance, and the name will be

[21] Carter v. Taylor, 3 Head (Tenn.), 30.

[22] Matheson v. Thompson, 20 Fla. 790.

[23] In such case specific performance will be decreed, with strict regard to the terms of the contract and the intervening equities. Where time is not of the essence of the contract the vendor will be allowed a reasonable time to obtain or perfect title. Rader v. Neal, 13 W. Va. 373.

[24] Jones v. Taylor, 7 Tex. 240.

considered the same.[25] So, also, the negligence of the recording officer will often produce a disparity of this kind; as where the records showed a deed to Electa Wilds, and a subsequent deed of the same property from Electa Wilder, Wilds being, however the true name.[26] In each of the foregoing cases as well as in cases similar thereto, the defect of title as shown by the records would undoubtedly be sufficient to warrant an intending purchaser in rejecting the title. The dissimilarity in the names would prevent the operation of the rule respecting *idem sonans,* and the legal effect would be that of an entire stranger to the title conveying the same and passing it on through the chain to the last vendee. But without disputing the rule that a marketable title must be free from reasonable doubt, it has frequently been held that defects in the record or paper title may be cured or removed by parol evidence.[27] A purchaser cannot justify his refusal to perform by a mere captious objection, but must show that there is ground for a reasonable doubt as to the title offered, such as affects its value and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record title, if amounting to a positive flaw, would, under most circumstances, furnish a reasonable basis for objection; but, on the other hand, if competent evidence is furnished showing conclusively a mistake in the record or the absolute identity of person with the different names, together with such other matters as would leave the case free from any reasonable doubt that the vendor possessed and could convey title, then, notwithstanding the apparent defect in the chain of title as shown by the records, a purchaser could not justly refuse to perform his agreement.[28]

§ 326. **Stipulation for failure of title.** It is now customary to make but a small cash payment at the time of closing a contract, where provision is made for the furnishing of an abstract of title; and this payment, while it applies upon the purchase, is generally regarded more in the light of an earn-

[25] Chiniquy v. Catholic Bishop, 41 Ill. 148.

[26] Hellreigel v. Manning, 97 N.Y. 56.

[27] Miller v. Macomb, 26 Wend. (N. Y.) 229; Murray v. Harway, 56 N. Y. 337.

[28] Hellreigel v. Manning, 97 N. Y. 56.

est—a guaranty of good faith—to be retained in case the purchaser makes default, or to be returned if the title after examination should prove unmarketable. The customary stipulation is that, "should the title to the property not prove good, then the payment to be refunded." The object of such a clause is to avoid disputes about the title, and while it is being adjusted the purchaser keeps his money, and the vendor will be enabled to find another purchaser if the vendee is dissatisfied with the title. But the vendee, in such case, must make his election. He cannot claim the benefit of the purchase and refuse to make his payments.[29]

§ 327. Agreement to furnish abstract, when an undertaking in respect to title. A vendor's obligation in respect to title is to be determined usually from the character of the conveyance to be made rather than from any agreement in respect to furnishing an abstract. The office of the latter is purely advisory; it is a compendium of information only, and it is presumed that the vendee upon its perusal is to exercise his own judgment with respect to any disclosures it may make. The agreement of the vendor may be to furnish a "satisfactory abstract of title," but this in itself cannot be said to imply any undertaking on the part of the vendor that the title disclosed shall be marketable or free from doubt. It is the abstract, not the title, that is to be satisfactory; and this has reference to its form, make-up, etc., and to the responsibility of the examiner who may have compiled it and certified to its correctness.

Where the contract specifically provides for an abstract showing a particular title, this may reasonably be construed as an undertaking for title, and as an agreement to produce evidence of such title, in default of which objections would lie; but even in such a case the recitals of the agreement concerning the estate to be conveyed and the deed to be given would probably control in the construction of the contract.

A clause which provides that the vendor is to furnish a satisfactory abstract of title and give a quitclaim deed, or one with limited covenants against the vendor's own acts, upon tender of which the cash payments are to be made, implies no undertaking as to the character of title to be conveyed, but,

[29] Brizzolara v. Mosher, 71 Ill. 41.

on the contrary, shows that the vendor assumes no responsibility as to the title any further than it may have been affected by his own acts.[30] In such a case, if the title is free from reasonable objection, the vendee would be bound to accept it; if not, he might either accept or reject it, as he should elect.

§ 328. **Immaterial defects.** It has been held that immaterial defects and merely technical objections will not defeat a sale, and that a court will not permit a purchaser to avoid his contract without seeing that the object of the purchase is defeated and that it would be injurious to him to enforce the contract.[31] This is particularly true where the purchaser contracts with full knowledge of the situation of the premises or the condition of the title;[32] and if he gets substantially what he bargained for, he must complete the purchase and take his deed. This is a matter, however, which rests in the sound discretion of the court, who should weigh the object and inducement of the purchaser, and, looking to the merits and substantial justice of each particular case, if the sale be fair, relieve or not from the purchase, according as the character of the transaction and circumstances may seem to require.[33]

As the law does not regard trifles, a reservation of a peppercorn or any other rent which is merely nominal is not a valid objection to the title of the vendor, who holds subject to the payment of such nominal rent; and so, in like manner, it has been held that it is no valid objection to the title of the vendor that the conveyance under which he holds contains a reservation of mines and minerals and water privileges, if from the evidence there is no reason to suppose there are any minerals or water privileges on the premises.[34]

§ 329. **Waiver of objections to title.** It may happen that the purchaser is satisfied with the title without investigation, or that he prefers to take the same and rely upon the covenants of his deed for protection against adverse claims; and if for any reason he sees fit to forego examination and waive

[30] Fitch v. Willard, 73 Ill. 92.

[31] Riggs v. Pursell, 66 N. Y. 193.

[32] Craddock v. Shirley, 3 A. K. Marsh. (Ky.) 288; Winne v. Reynolds, 6 Paige (N. Y.), 407; Tompkins v. Hyatt, 28 N. Y. 347.

[33] Riggs v. Pursell, 66 N. Y. 193; King v. Bardeau, 6 John. Ch. (N. Y.) 38.

[34] Winne v. Reynolds, 6 Paige (N. Y.), 407.

all objections to title, and this intention is unequivocally expressed, there can be no doubt that he will be held to the terms of his agreement, even though there is provision for an abstract of title, and by the abstract serious defects and imperfections are disclosed.

The mere fact of taking possession and exercising acts of ownership over the land will not preclude the purchaser from his right to investigate the title, unless it clearly appears that he intended to waive and has actually waived such right. The waiver is always a question of intention, and one of fact from all the circumstances, and not an arbitrary presumption of law from the mere fact of taking possession; and where by the terms of the contract the vendor was to give immediate possession, and also to furnish an abstract of the title, but with no time fixed for the latter, this will have an important bearing upon the question of waiver of objections to the title by the vendee in taking possession, as possession in such case is consistent with the contract.[35] It is better, however, that the purchaser should not take possession until every objection to the title has been removed, lest the act should be deemed an acceptance of the title; and the rule deduced from the English cases is that, if the purchaser take possession of and enjoy the property, it is the duty of the court to make every reasonable presumption in favor of the contract.[36] Still, the current of English decisions coincides with the views first stated, and announces the doctrine that a purchaser may with the concurrence of the vendor safely take possession of the land at the time the contract is entered into, as he cannot be held to have waived objections of which he was not aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay rent for the property, even though the occupation of it has been beneficial to him.[37]

Yet, while the mere fact of taking possession does not in itself amount to a waiver of objections to title, and while other circumstances are usually required to raise the presumption of waiver, if the purchaser does enter into possession

[35] Page v. Greeley, 75 Ill. 400.

[36] And see Richmond v. Gray, 3 Allen (Mass.), 25.

[37] See 1 Sug. Vend. 12, and cases cited.

under the contract with knowledge of a slight defect in the vendor's title or a slight incumbrance upon it, he will be held in many cases to have waived his objections, and will be deemed to have accepted the title as he knew it existed, intending to rely, in case of failure, upon the covenants of warranty for redress.[38]

§ 330. **Effect of delay in making objection.** Where the purchase of land is made upon condition that a perfect title shall be shown, the purchaser, in the absence of any stipulation as to time, is only entitled to a reasonable period in which to determine whether he will take the title the vendor has or reject it. He cannot keep the contract open indefinitely, so as to avail of a rise in the value of the property, or relieve himself in case of a depreciation.[39] Hence, any unreasonable delay by the purchaser in the exercise of his option to avoid the contract for objections to the title will defeat his right to a specific performance.[40]

If a day has been fixed for the conveyance of the property, the vendee, if he wishes to object to the title, must give notice of his objections a reasonable time previous thereto, to enable the vendor to remove the objections if possible, and to make conveyance at the time specified; and in case of his neglect so to do, a court of equity may consider a strict performance of the contract by a conveyance on the specified day as waived. And where the vendor has not been guilty of gross negligence in perfecting his title, equity may decree a specific performance upon a bill filed by him, although the title was not perfected on the specified day, unless the time of perfecting the same is, by the terms of the agreement, made an essential part of the contract.[41]

[38] See Jones v. Taylor, 7 Tex. 240; Winne v. Reynolds, 6 Paige (N. Y.), 407; Riggs v. Pursell, 66 N. Y. 193; Craddock v. Shirley, 3 A. K. Marsh. (Ky.) 288.

[39] Hoyt v. Tuxbury, 70 Ill. 331.

[40] Unusual delay, unexplained by equitable circumstances, will ordinarily bar any claim for relief in equity. Walker v. Douglass, 70 Ill. 445; Iglehart v. Vail, 73 Ill. 63. Where the vendee was to satisfy himself as to the title and make payment within two weeks, but failed to do so, and more than a year afterwards tendered the purchase money and demanded the conveyance, *held*, that he was guilty of laches, and not entitled to conveyance. Lanitz v. King, 6 S. W. Rep. (Mo.) 263.

[41] More v. Smedburgh, 8 Paige (N. Y.), 600.

§ 331. **Defects in the subject-matter.** Aside from objections to the title the purchaser may sometimes found objections upon matters connected with or incident to the land itself. Ordinarily, he will be presumed to know the condition of the property and to purchase with notice of its character, condition and surroundings; and unless some imposition has been practiced upon him he will not be heard to object on account of the same. Nor will he be permitted to refuse to perform because of trifles for which compensation can be readily made.[42] Where the purchaser gets substantially all for which he contracted, a slight deficiency will form no ground for a refusal to proceed, where the deficiency is occasioned by no bad faith on the part of the vendor, and when a full compensation can be made in money.[43] This is undoubtedly the rule in equity, but it seems it may not always be invoked at law; and where a vendor brings his action not to compel a specific performance but to recover damages for a refusal to perform, he must be held strictly to the very terms of his agreement, and show performance of all the conditions necessary to be performed on his part to put the vendee in default.

A vendee is ordinarily entitled to the property in the condition in which it was when bargained for, and he may refuse to take it in an altered or inferior condition; and while a court of equity will in most instances decree performance where it is apparent that compensation can be made in money for the altered condition of the property, yet at law the vendor by his own failure to perform would have no right of action for damages against his vendee.[44]

[42] As, for instance, that a water-wheel was slightly out of repair, or that certain articles of machinery were claimed by a tenant, there being no bad faith on the vendor's part. Towner v. Tickner, 112 Ill. 217. But see Smyth v. Sturges, 108 N. Y. 495.

[43] The general equity doctrine is that, although there may be a deficiency in the property sold, if the deficiency is inconsiderable, and does not materially affect the value of the remainder, the purchaser may be compelled to accept compensation for such deficiency and perform the agreement. De Wolf v. Pratt, 42 Ill. 198.

[44] As where T. entered into a contract with defendant, by which T. agreed to sell to defendant, and the latter agreed to purchase, certain lots upon which were stores, and to convey the same by warranty deed free from all incumbrances. There were at the time various fixtures,

consisting of partitions, gas-pipe, plumbing, etc., which had been put in by a tenant, who afterwards and before the tender of a deed removed them, in consequence of which defendant refused to take title. T. offered to make compensation, but this was also refused. In an action to recover damages, *held*, that the defendant was entitled to the stores in the condition they were when bargained for, and his refusal to take them with the fixtures removed was not a breach of the contract, and that the action was not maintainable. Smyth v. Sturges, 108 N. Y. 495.

PART III

THE CONVEYANCE.

CHAPTER XII.

THE MEDIUM OF TRANSFER.

§ 332. Deeds—Defined and distinguished.
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§ 332. Deeds—Defined and distinguished. The operative instrument whereby the transmissal of estate and devolution of title is effected is generally termed a deed—a name of very ancient origin and extensive signification. It applies to the conveyance of every species of property, and in its widest sense includes every instrument under seal containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee.

Originally deeds of land were complicated in form,[1] highly technical, and very verbose, but modern conveyancing has

[1] The elementary writers classify common-law deeds as follows: Five original conveyances, to wit: Feoffment, Gift, Rent, Lease, Exchange and Partition; five derivative conveyances, to wit: Release, Confirmation, Surrender, Assignment and Defeasance; and five conveyances derived from the statute of uses, to wit: Covenant to stand seized to uses, Bargain and sale, Lease and release, Deed to lead or declare the uses of other more direct conveyances, and Deeds of

reduced them to very simple forms, while the liberal construction of courts, together with radical statutory changes, have stripped them of many of their technical features.

According to the earlier cases, as well as many later confirmatory authorities, deeds to be valid and effectual must be in writing, and upon parchment or paper; must be between parties competent to give and receive title; must be freely made, and completely written before delivery.

Anciently a distinction was made between deeds of feoffment[2] and deeds of grant,[3] but this distinction no longer has any practical existence; and, generally speaking, all deeds now in common use are deeds of grant.

§ 333. **Forms of conveyance.** All of the different kinds of deeds now in common use are but variations of two original forms which had their origin in England and have been transmitted to us with the rest of our inheritance of the common law. These forms are known respectively as *deeds-poll* and *indentures,* or *deeds inter partes.* The former was used only where the instrument was the sole act of the grantor, and

revocation of uses. Willard, Conveyancing, 419; 3 Wash. Real Prop. ch. 5.

[2] A feoffment originally meant the gift of a feud, but, since the abolition of feudal tenures in England, signifies the conveyancē of an estate in fee-simple. Livery of seizin was the distinguishing feature of feoffment, which in the United States is unknown; execution, delivery and registration being sufficient to pass title, although the possession remains unchanged. Livery of seizin, as defined by the ancient writers, is either *in deed* or *in law.* The former is where the parties go upon the land, and the feoffor, by some symbolical act, as the delivery of a twig, turf, or latch of a door, or even by express words without any act, gives possession to the feoffee. Mere delivery of a deed on the land is not sufficient, unless it be made in the name of seizin of all the lands contained therein. If a lessee is in possession his consent is necessary to livery. *Livery in law* is where the parties are not upon, but only in sight of, the land; and the feoffor pointing it out, gives it to the feoffee, and authorizes him to take possession. This, however, is a mere license or authority, which must be consummated by actual entry; and if either of the parties die before entry the transfer does not take effect. But if the feoffee dare not enter for fear of his life, a claim as near the land as possible will be sufficient. Co. Lit. 48 *b;* 2 Hill. Abridg. 307.

[3] A grant at common law is the conveyance of incorporeal hereditaments, such as rents, commons, etc., which are said to lie in grant and to pass only by deed.

where no reciprocal duties or obligations were imposed upon the other party; the latter, on the other hand, was employed in cases where there were mutual transfers or covenants; and while the former consisted only of one instrument, signed by the grantor and delivered to the grantee, the latter consisted of two or more parts, executed by all of the parties, and interchangeably delivered one to the other. The name indenture is said to have been derived from the practice of writing both parts of the agreement upon one parchment, with certain letters between them, and then cutting the parts asunder in acute angles.[4]

Although the forms have been retained the practical distinction between deeds-poll and indentures has ceased to exist; and, while indenture is the proper and customary form for deeds *inter partes,* it is not uncommon to find deeds-poll in fact that employ the formula of indentures.[5]

Much formality was formerly employed in framing a deed, which for the sake of convenience was divided into a number of distinct parts;[6] but custom has long since reduced the phrasing of these parts to comparatively brief clauses, while the legislatures in most of the states have practically abrogated all of the ancient formal divisions.

[4] See 2 Hill. Abridg. 280; 2 Shars. Black, Com. 294. Where a question arose whether a certain ancient transfer was a deed or an authorized transfer upon the town books, it was held that the fact of its purporting to be an indenture (as well as to be signed, sealed and delivered) proved it to be a deed. Merwin v. Camp, 3 Conn. 41.

[5] The indenture is the form of conveyance in common use in a majority of the states, while the use of the deed-poll is mainly confined to the states of Alabama, Arkansas, Connecticut, Iowa, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas and Vermont. See Jones' Forms Conv. 260.

[6] The formal parts of a common-law deed are as follows:

The *premises*, which consists of the introductory part, including the date (although this is sometimes placed at the end), the parties, the consideration recitals, the grant, the description, and exception, if any.

The *habendum*, which declares the estate or interest granted, although this may also be done in the premises.

The *tenendum*, which accompanies the *habendum*, and expresses the tenure of the estate.

The *reddendum*, or reservation to the grantor of some new thing in the land.

The *conditions*, the *covenants* and the *conclusion*, reciting the

§ 334. **Deeds of bargain and sale.** The modes of conveyance now most prevalent in the United States are those derived from the English deed of bargain and sale under the statute of uses.[7] A bargain and sale was originally a mere oral agreement for the conveyance of land for a valuable consideration, in consequence of which a use arose to the bargainee. But to check the multiplication of secret conveyances, an act was passed soon after the statute of uses which required all conveyances by way of bargain and sale to be made in writing, indented and sealed, and, if it was of a freehold estate, to be enrolled in one of the courts of record.

No livery of seizin was necessary to a bargain and sale to make the deed effectual, the statute executing the use and thereby transferring the possession to the legal title without entry or other act.[8]

§ 335. **Warranty deeds.** The most familiar form of conveyance known to our law is the deed of bargain and sale, technically called a warranty deed. The legal import of a deed of this character is that of absolute conveyance and that there is no resulting trust in the grantor, who is estopped from ever after denying its execution for the uses and purposes mentioned in it, while its name is derived from the personal covenants which follow the *habendum*.

execution and the date, either expressly or by reference to the beginning.

[7] In England there are two classes of conveyances, which derive their operation from the statute of uses. The first class consists of those which create a use alone, without any transmutation of possession under the common law. The second class consists of those conveyances which transfer the land as by a common-law assurance, and in addition thereto raise or declare a use upon the legal estate vested in the grantee. To the former class belong a bargain and sale, and a covenant to stand seized to uses; to the latter, a feoffment and a fine made to one person to the use of another.

[8] The statute of 27 Hen. VIII., called the statute of uses, recites that by the common law lands could not be passed by will, but only by livery of seizin; but that divers subtle practices had been introduced in the form of fraudulent conveyances and assurances and of last wills, whereby heirs were disinherited, lords deprived of their dues, husbands and wives of curtesy and dower, and perjuries committed. The statute then proceeds to enact that, where any person was or should be seized of any honors, manors, lands, tenements, rents, services, reversions, remainders or other heredita-

The operative words of conveyance in this class of deeds are "grant, bargain and sell," and these words in many states are declared to be covenants of seizin, freedom from incumbrances and quiet enjoyment, unless their statutory effect is rendered nugatory or limited by express words contained in such deed.[9] It is still a common practice for the conveyancer to insert in warranty deeds, as well as in other classes of conveyances, all the operative terms used in transferring lands; as, "grant, bargain, sell, remise, release, alien, convey and confirm," though their presence, save where they imply covenants, is no longer necessary. This was formerly done that the instrument might take effect in one way if not in another, and in such case the party receiving the deed had his election which way to take it. Thus, according to the words used, he might claim either by grant, feoffment, gift, lease, release, confirmation or surrender. The majority of the foregoing words of grant are now superfluous, except that in a few states the words "grant, bargain and sell" must, under the statute, be construed as express or implied covenants for seizin, against incumbrances, etc.;[10] yet the rule that the law of the state where the land lies governs the interpretation of the deed does not warrant the implication of personal covenants not authorized by the law of the state where the deed was made. The question whether the words shall import covenants must be decided by the law of the latter state.[11] It must also be understood that some words evidencing an intention to convey must appear; but the conveyancer has a choice of a number, and the word "convey," which is most in use, fully expresses the intent, and is effectual for all purposes.[12]

§ 336. **Quitclaim deeds.** There is in common use in the United States a species of conveyance derived from the deed

ments to the use, confidence or trust of any person or body politic, the latter should have the legal seizin and possession, nominally given to the former, and corresponding to the use, trust and confidence held previously to the statute in lands so limited; and, where lands were limited to several persons to the use of a part of them, the latter alone should have the seizin and possession. The statute has been substantially reenacted in many states.

[9] Finley v. Steele, 23 Ill. 56.

[10] Brodie v. Watkins, 31 Ark. 319; Finley v. Steele, 23 Ill. 56.

[11] Bethel v. Bethel, 54 Ind. 428.

[12] An extremely simple form of a deed in fee is given in 4 Kent,

of bargain and sale under the statute of uses, but bearing a strong affinity to the old common-law deed of release, called a quitclaim. Its import is a conveyance or release of all present interest in the grantor; but, unlike the common-law release, which was only effectual in favor of some person in possession, or who claimed or had some interest in the land, it is equally available as a mode of conveying an independent title, and for all practical purposes is regarded as an original conveyance. A quitclaim deed is as effectual for transferring the title to real estate as a deed of bargain and sale, and passes to the grantee all the present interest or estate of the grantor, together with the covenants running with the land, unless there be special words limiting and restricting the conveyance. But while a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the parties as gathered from the instrument; and if the words used indicate a clear intention to pass only such land or interests as the grantor then owns, lands embraced in a prior valid deed have been held to be reserved from its operation, even though such prior deed remains unrecorded.

The authorities in respect to the operation and effect of quitclaim deeds are conflicting, the obsolete doctrines of the old common law release being still retained in some measure in a number of states. The tendency of the decisions, however, is, that a quitclaim is not merely a release, but a substantive form of conveyance, and that a purchaser thereunder, who takes without notice of latent equities is not distinguishable from one who takes under a deed of bargain and sale.[13]

§ 337. **Release.** The term "release," in its popular and limited signification, is used to denote the instrument whereby the interest conveyed by a mortgage is reconveyed to the owner of the fee, and it is also used generally to designate

Com. 461; and see Hutchins v. Carleton, 19 N. H. 487; Bridge v. Wellington, 1 Mass. 219.

[13] Wilhelm v. Wilken, 149 N. Y. 447; Graff v. Middleton, 43 Cal. 341; Chapman v. Sims, 53 Miss. 154; Willingham v. Hardin, 75 Mo. 429; Cutler v. James, 64 Wis. 173; Merrill v. Hutchinson, 45 Kan. 59; Brown v. Banner Coal Co. 97 Ill. 214; but see *contra,* Peters v. Cartier, 80 Mich. 124; Smith v. Bank, 21 Ala. 125; Richardson v. Levi, 67 Tex. 359; Steele v. Bank, 79 Iowa 339.

the conveyance of a right of any kind to a person in possession. In England it obtains in a fourfold form, and is one of the most important of the common-law forms of conveyance. In the United States the technical principles relating to deeds of this character are wholly or in a great measure inapplicable, while the conveyance which corresponds to a release at common law is the popular quitclaim deed—the operative words of conveyance being the same in both deeds. Where a deed remising and releasing premises contains a covenant of warranty of title, either general or simply as against the claims of all persons claiming under the grantor only, and particularly if the *habendum* be to the grantee, his heirs, etc., it will not be a simple release, but a conveyance of the fee; and a title subsequently acquired by the grantor will inure to the grantee unless it is derived from sale under an incumbrance assumed by the grantee.[14]

§ 338. **Confirmation.** The term "confirmation" is used to designate that species of conveyance whereby an existing right or voidable estate is made sure and unavoidable or where a particular interest is increased. The appropriate technical words of confirmation are "ratify, approve and confirm," but "grant and convey" or similar terms will have the same effect. Deeds of confirmation are not in general use, as a "quitclaim" is effective for almost every purpose which might be accomplished by the former. Frequently, however, recitals

[14] People *ex rel.* Weber v. Herbel, 96 Ill. 384. There is a mode of conveyance operating in part under the statutes of uses which at one time was often recognized in the United States and is said to be the common mode of conveyance in England. This species of conveyance is called a *lease and release;* and while it seems to have been employed in this country during the latter part of the last century it is now unknown, having been superseded by the deed of bargain and sale. A lease and release is in fact a bargain and sale for a year, and a common-law release operating by way of enlargement. After the statute of uses, and the subsequent statute requiring enrollment of deeds of bargain and sale, it became an object to transfer the use in land by some method not requiring the publicity of such enrollment or of actual possession. The latter statute being held inapplicable to conveyances for years, this method was found in making a bargain and sale for a year, and subsequently a common-law release enlarging the estate of the bargainee into a fee. The release would take effect though the bargainee never had actual posses-

in deeds show them to be given in ratification or confirmation of previous acts and to correct errors, irregularities or infirmities in former deeds, in which event they take effect by relation as of the date of the former act or deed, and the confirmatory words become material to interpret and explain the undisclosed intention or correct the irregularity of the former deed.

§ 339. **Surrender.** A surrender is defined as the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, the lesser estate being merged in the greater by mutual agreement; and the term is applied both to the act and the instrument by which it is accomplished. It is directly opposite in its nature to a release, which technically operates by the greater estate descending upon the lesser. The operative words of a conveyance of this nature are "surrender and yield up," but any form of words that indicates the intention of the parties will serve the same purpose; while a surrender is always implied when an estate incompatible with the existing estate is accepted. Though the books on conveyancing still continue to give ample forms for deeds of surrender, the quitclaim deed in common use has taken its place for most purposes; but it would seem that this is still the proper instrument for the relinquishment of leasehold interests, dower, etc.[15]

§ 340. **Assignment.** An assignment is a mode of conveyance applicable to any estate in lands whatever; but the term is usually employed to express the transfer of an equitable estate or a chattel interest. The operative words of conveyance are "assign, transfer and set over," but any other words evincing an intention to make a complete transfer are sufficient.

A new meaning has within very recent years been given to

sion, because the statute of uses without possession vested the actual estate in him, upon which the release could operate. This point, though once doubted, was at length fully settled. 2 Hill. Abridg. 330; 4 Cruise, Dig. 103.

[15] At common law lands might be surrendered without deed or livery. But things lying in grant could not, as a deed was necessary to create them. And even such things, lying in grant, as were not created by deed, were subject to the same rule; as, for instance, a remainder for life after a lease for life. So an estate by the curtesy or in dower. 4 Cruise, Dig. 79,

this word, as applied to sales of real property, by the action of a few courts of last resort. While the tendency of courts has long been to discourage technical rules of construction, when such rules tend to defeat the manifest intention of the parties, yet the cardinal principles which have always obtained have not heretofore been disturbed. Thus, a grant, to be effective as a conveyance of land, must, by apt language, describe the parties and the thing granted and the description so given should be complete in itself and of such a character as to preclude a resort to extrinsic evidence. The rights of property imperatively demand a strict adhesion to these principles. A "liberal construction" does not justify the judicial interpolation of words. For this reason it would seem to be in consonance with sound principles of law that an assignment endorsed upon a deed should be inoperative to effect a conveyance of the land therein described or transfer title.[16] A contrary opinion has been reached, however, in several cases, the effect of which, if generally followed, may be to overturn much of the established law relating to deeds and the methods of legal conveyancing. Thus, it has been held that where a grantee in a deed places upon the back of it an assignment to a third person, for value, of all his title and interest "in and to the within deed" and delivers same, such assignment will be effective as a transfer of the legal title to the land in such deed described.[17]

The controlling motive which seems to have induced the foregoing ruling was the familiar doctrine that it is not essential that a deed should be couched in any precise form of words and that courts should give effect to the intention of the parties. But, while equity, upon a proper showing, would probably treat such an endorsement as an executory contract to convey, it is doing violence to all the rules of conveyancing, as well as setting a dangerous precedent in loose methods, to call such a writing a deed.

§ 341. **Defeasance.** A defeasance has been defined as a collateral deed, made at the same time with a feoffment or grant, containing certain conditions upon performance of

[16] Tunstall v. Cobb, 109 N. C. 316; Arms v. Burt, 1 Vt. 303; Lessee of Bently v. Deforest, 2 Ohio 221.

[17] See Harlowe v. Hudgins, 84 Tex. 107; Lemon v. Graham, 131 Pa. St. 447.

which the estate thereby created may be defeated.[18] It differs from a condition in nothing but that the latter makes a part of the conveyance itself, while the former constitutes a separate instrument. It was formerly much used in connection with mortgages, but at present, and in the United States, it is practically obsolete.

§ 342. **Covenant to stand seized.** There is another form of conveyance, operating under the statute of uses, called a covenant to stand seized to uses. Formerly, if one person covenanted for himself and his heirs that for a certain consideration another should have his land, though the land did not pass for want of livery, yet the covenantee gained the use; and after the enactment of the statute of uses the use thus acquired became executed by the statute and the party to be benefited at once placed in possession of the land. This form of deed seems to have been a very peculiar species of conveyance, confined entirely to family connections and founded on the tender consideration of blood or marriage;[19] but this limitation, while undoubtedly expressing the English law on the subject, has been denied in some of the later American cases, which, while admitting that the law recognizes the natural affections, and the mutual obligation of support which springs from the family relations, as affording a good and meritorious consideration for a deed of conveyance, yet deny that any form of conveyance can be so consecrated by a mere sentiment that it cannot be permitted to operate between any parties other than relatives, nor upon a pecuniary consideration. Upon every principle of the law of contracts, money is now considered as a sufficient consideration for the support of any contract whatever, so far as its validity depends upon a consideration as such; and it may be safely asserted that the distinction between a deed of bargain and sale and a covenant to stand seized, so far as the same may depend upon the nature of the consideration, does not at the present time exist in this country.[20]

[18] 4 Cruise, Dig. 82.

[19] See Jackson v. Sebring, 16 Johns. (N. Y.) 515; French v. French, 15 N. H. 381.

[20] See Trafton v. Hawes, 102 Mass. 533; Parker v. Nichols, 7 Pick. (Mass.) 111. If a father bargain and sell land, with warranty to his child or grandchild, to hold from the grantor's death, the law will presume a good consideration in addition to the valuable con-

Nor can a mere covenant to convey now be said to operate to transfer an estate; and although, for certain purposes, courts of equity will regard a covenantee as possessed of an equitable interest in the land, yet at law such a covenant can generally have no higher effect than a personal contract affording a foundation for damages in law or grounds for relief by way of specific enforcement in equity.

But while conveyances of this character have practically ceased to exist, the principle and rules which pertained to them have to some extent been retained, and in the furtherance of intention courts still resort to them to give effect to deeds which by reason of insufficiency are unable to operate in other ways.[21]

§ 343. Imperfect deed—Operation and effect. The rule is strongly established in equity that a contract evidenced by a writing cannot be defeated by innocent mistake or error; and, in pursuance of this principle, a long list of authorities confirm the doctrine that where a deed is insufficient as a conveyance it may still have effect as an executory contract to convey. Notwithstanding a deed may be technically defective, yet, if made by a person possessing title, it will still be valid as between the parties, so as to bind the lands conveyed in the hands of the grantor, his heirs, and all others claiming under him by operation of law, as well as subsequent purchasers with notice;[22] and courts of equity will always interfere for the relief of a vendee who has taken by a defective conveyance, and compel a proper transfer.[23]

The rule is applied in all cases where there has been a

sideration expressed in the deed, and construe it a covenant of the grantor to stand seized to his own use during his life, and after his death to the use of the grantee. Wallis v. Wallis, 4 Mass. 135.

[21] See Exum. v. Canty, 34 Miss. 569; Horton v. Sledge, 29 Ala. 478. A quitclaim deed in common form, except that the *habendum* clause provides that the conveyance shall take effect from and after the day of the grantor's decease, is to be construed as a covenant to stand seized, especially where the intent is unmistakable from the relationship of the parties. The deed is not invalidated by the fact that its terms attempt to create an estate in fee *in futuro*. Kent v. Atlantic Delaine Co. 8 R. I. 305.

[22] Mastin v. Halley, 61 Mo. 199; Ross v. Worthington, 11 Minn. 442; Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 224.

[23] Mastin v. Halley, 61 Mo. 199; Conrad v. Schwamb, 53 Wis. 372; Jewell v. Harding, 72 Me. 126.

casual omission by accident or mistake of some technical requirement necessary to make an instrument valid or effectual;[24] and even where a deed, duly executed and otherwise complete, fails through misdescription to convey the land intended, it may still be treated as a contract to convey which equity will enforce.[25]

§ 344. **When vendee entitled to deed.** The conditions of sale usually provide for the time and manner of passing title and when these matters are regulated by express agreement no question can ordinarily arise with respect to same. In the absence of special provisions in reference thereto the general rule would seem to be that the vendee is not entitled to conveyance until full payment of the purchase-money has been made. In such case, the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender or demand.[26]

§ 345. **Time to prepare deed—Demand for same.** The general rule is that when a party agrees to perform an act, and no time is specified for its completion, he must have a reasonable time for the purpose; and to be put in default the opposite party must demand its performance. In pursuance of this rule it has been held that where the vendor of land receives the purchase money for the same and agrees to convey it to the purchaser, but no time is specified, he is entitled to a reasonable time within which to make the conveyance, and the purchaser in such case should demand a deed; and the vendor should refuse or neglect to comply with the demand before the purchaser can recover back the money paid by him as the consideration of the conveyance.[27]

It has further been held that a vendor of lands who has covenanted to convey by a day certain is not in default until the party who is to receive the conveyance, being entitled

[24] An instrument purporting to convey land, but which by mistake has only one witness, and is not sealed, is in equity a contract to convey the land described, and the consideration expressed will be presumed to be the true consideration for the conveyance. Dreutzer v. Lawrence, 58 Wis. 594. And see Brinkley v. Bethel, 9 Heisk. (Tenn.) 789; McCarley v. Supervisors, 58 Miss. 486.

[25] Conrad v. Schwamb, 53 Wis. 372.

[26] Easton v. Montgomery, 90 Cal. 307.

[27] Kime v. Kime, 41 Ill. 397.

thereto, has demanded it, and, having waited a reasonable time to have it drawn and executed, has made a second demand.[28] It seems, however, that the purchaser may avoid the necessity of a second demand by tendering on the first demand a deed prepared for execution;[29] nor will a second demand be necessary if on the first demand the vendor refuse to execute the deed.[30] So, where there are several persons jointly bound to execute a deed, and the same is demanded of one of them and refused, no demand of the others will be necessary—the refusal of one subjects all to an action.[31]

§ 346. Vendee's right to inspect deed. It would seem reasonable that, under the practice which prevails in this country whereby the vendor and not the vendee prepares and tenders the deed, the vendee should have suitable opportunity of examining the same before he pays the purchase money, and that the vendor should, upon demand made, exhibit such deed that the vendee may found any proper objections to its form or substance. Ordinarily, however, the delivery of the deed and the payment of the purchase money are contemporaneous acts; and while inspection may follow at such a time as an incident, it does not appear, unless the contract so provides, that a vendee has the right to insist upon an inspection of his vendor's deed before paying the purchase money agreed upon.[32] But where the purchaser offers to make payment on inspection of the deed, provided it shall prove satisfactory, and the vendor refuses to allow inspection, though stating that he has the same prepared and ready for delivery on payment, this will not be regarded as a sufficient tender of the deed, or a manifestation of such a willingness to comply with

[28] Connelly v. Pierce, 7 Wend. (N. Y.) 129.

[29] Connelly v. Pierce, 7 Wend. (N. Y.) 129.

[30] Blood v. Goodrich, 9 Wend. 68.

[31] Blood v. Goodrich, 9 Wend. 68.

[32] Under a contract for the sale and conveyance of land, the purchaser was to make payment on or before a day named, when the vendor was to deliver conveyance. On the day preceding this day, the assignee of the purchaser, having the money necessary, offered to pay it, if, upon inspection of the deed, it should prove satisfactory, which inspection the vendor refused, but offered to deliver the same on deposit of the money with his banker, which the assignee refused to do. *Held*, that neither party was relieved from his obligation under the contract by what then transpired. Papin v. Goodrich, 103 Ill. 86.

his contract as will authorize him then, on the refusal of the purchaser to perform, to file a bill to cancel the contract.[33]

Possibly the proof of a local custom to afford purchasers an opportunity to inspect the deed before requiring them to make payment might be shown in cases similar to the foregoing; but in order to do this there should also be evidence to prove that the custom was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it;[34] but unless this is also shown the evidence of custom should be excluded. And the attempt to show such a custom is open to the further objection that, unless the delivery of the deed is made a precedent act, it is impossible that there could be a custom to allow a party to inspect a deed at a time when there is no legal duty to have such deed made and ready for delivery.[35] Thus, where a deed is to be delivered and possession given on payment of a sum certain, the payment of the consideration must precede the right of the purchaser to receive a deed.[36]

§ 347. Vendor not required to take deed from third party. Where one party agrees to convey to another by warranty deed a certain tract of land, the legal title to which is vested in a third person, the procuring of the conveyance of the land by such third person, with his warranty will not answer its requirements;[37] the party who was to receive the deed is entitled to have the personal covenants of him who agreed to convey as a further security for his title.[38]

§ 348. When contract has been assigned. When a vendee has contracted for the purchase of land and sold it to another, the latter will be entitled to receive from the first vendor the same kind of deed which he contracted to give his vendee.[39]

§ 349. Objections to deed. It is the duty of the purchaser,

[33] Papin v. Goodrich, 103 Ill. 86.

[34] Turner v. Dawson, 50 Ill. 85; and see § 117, *supra*.

[35] Papin v. Goodrich, 103 Ill. 86. In this case the purchaser demanded inspection of the deed on the day fixed for the payment of purchase money and delivery of deed.

[36] Terry v. George, 37 Miss. 539; Headley v. Shaw, 39 Ill. 354; Rabb v. Montgomery, 20 Johns. (N. Y.) 15.

[37] Hussey v. Roquemore, 27 Ala. 281; but see Dresel v. Jordan, 104 Mass. 407.

[38] Crabtree v. Levings, 53 Ill. 526; Rudd v. Savelli, 44 Ark. 145.

[39] Gibbs v. Blackwell, 37 Ill. 191.

upon tender of deed, to raise and urge whatever objections he may have either as to form or substance; and although the deed tendered by the vendor may not conform to the terms of the contract, yet if the vendee makes no objection to the same, but merely declares his inability to pay for the land, it seems that he thereby waives all objections to the deed and cannot raise the objections upon a suit afterwards brought.[40] It has also been held that where the deed presented is objectionable in substance, or fails to conform to the agreement, the vendee should prepare a deed and present it to the vendor for execution before the vendor can be put in default.[41]

The foregoing principles are more particularly applicable to a purchaser who has been let into possession, and against such the rule will usually be strictly enforced; nor can a purchaser who has had possession sustain his refusal to take a deed by the fact that it was not tendered punctually.[42] Where a purchaser goes into possession under an agreement to purchase, and some of the payments are deferred, the title papers remaining in escrow until the payments are made, after an occupation of several years, knowledge that the papers are in escrow, and payment of part of the purchase money without objection, will be deemed a waiver of all formal exceptions to the regularity of the papers.[43]

Nor do the foregoing remarks apply exclusively to the vendee. By the English practice the duty of preparing the

[40] Moak v. Bryant, 51 Miss. 560. In this case the vendee was in possession, and the objections were raised for the first time when sued for the possession of the land. And see Kenniston v. Blakie, 121 Mass. 552.

[41] Where a vendor of real estate, who was under a contract to execute and deliver a deed by a day certain, executed and tendered a deed which the vendee refused to accept, on the allegation that the true consideration of the conveyance was not expressed in it; and where, from the evidence produced on the trial, the true sum which ought to have been inserted as the consideration did not appear, the court refused to set aside a nonsuit which had been ordered, and intimated their opinion that, to put the vendor in default, the vendee should have prepared a deed conformable to the agreement and presented it to the vendor for execution, who, on refusal, would have been liable to an action. Hackett v. Huson, 3 Wend. (N. Y.) 249.

[42] Curran v. Rogers, 35 Mich. 221.

[43] Thayer v. Torrey, 37 N. J. L. 339. In this case the vendee retained possession for four years before making objection.

deed devolves on the vendee, who is required, in due time, to present the same to the vendor for execution. This custom does not and never has prevailed in the United States, where the tender of a properly executed deed is a part of the obligation of the vendor. But it would seem that if the vendee, either in pursuance of the agreement or as a voluntary act, assumes such duty, a corresponding duty of seasonable objection thereto rests upon the vendor; and where, in pursuance of an agreement, the vendee tenders for execution by the vendor a different deed from that called for by the contract, the vendor must make his objections, if he has any, at the time of presentation or within a reasonable time thereafter. He cannot be permitted to retain the proposed deed without objection, or reservation of the right to object, and afterwards, when sued for a breach of contract, set up the objection for the first time in answer to the action.[44]

A failure to object to a deed when tendered cannot be said to be conclusive on the question of waiver of objections, however; but it is a significant circumstance strongly tending to indicate waiver, and when taken in connection with other facts may have an important bearing upon the question when presented.[45]

The obligation of the vendee cannot be enlarged by implication, nor can he be made to assume burdens which have not been distinctly and specifically enumerated in the contract. For this reason a tender of a deed reciting that the grantee assumes the payment of a mortgage therein described is not a compliance by the vendor with a contract that the conveyance should be made subject to the incumbrance of the mortgage; nor will such tender relieve the vendor from his obligation under the contract.[46]

§ 350. **Duty of preparing deed.** It seems that in England the duty of preparing and presenting the deed devolves upon the purchaser;[47] and this fact is sometimes cited in the United States as an excuse for neglect or delay on the part of the

[44] Morgan v. Stearns, 40 Cal. 434. Compare Dresel v. Jordan, 104 Mass. 407.

[45] Gault v. Van Zile, 37 Mich. 22.

[46] Mellon v. Webster, 5 Mo. App. 449; Kohner v. Higgins, 42 N. Y. Sup. Ct. 4.

[47] 1 Sug. on Vend. 366 (8th Am. ed.) and cases cited.

vendor.[48] It may be safely asserted, however, that this rule, if indeed it ever obtained, has long since been reversed; and in most if not all of the states, unless there has been some express stipulation to the contrary, the vendor is bound to prepare the deed at his own expense and tender the same to the vendee properly executed.[49] Until this has been done, or an offer of the same made, no right of action exists against the vendee, unless by his acts or conduct the vendor has been discharged or excused from the performance of the duty.[50]

If a mortgage is to be given back by the purchaser he must prepare and execute one in order to make a proper tender when demanding a conveyance.[51]

§ 351. What method of conveyance is sufficient. In every contract for the sale of lands, whatever may be the language in which it is couched, there is an implied undertaking to furnish a marketable title, unless such an obligation is expressly excluded by the terms of the agreement,[52] and, in the absence of any stipulation as to the kind of conveyance, to make such a deed as will render the sale effectual.[53] If the contract calls for a specific title or method of conveyance, the purchaser may insist upon a strict performance, and cannot be compelled to accept any other or different title or medium of transfer, notwithstanding such proposed substitutes may be equally as good.[54]

But under the legal rules of construction now applied to conveyances of land and estates and interests therein, the form of the instrument of transfer has become a matter of minor importance. The technical operative words, whether of grant or limitation, have wholly, or in a large measure, lost

[48] Taylor v. Longworth, 14 Pet. (U. S.) 172.

[49] Tinney v. Ashley, 15 Pick. (Mass.) 546; Hill v. Hobart, 16 Me. 164; Connelly v. Pierce, 7 Wend. (N. Y.) 129; Headley v. Show, 39 Ill. 354; Walling v. Kinnard, 10 Tex. 508; Seely v. Howard, 13 Wis. 336 Winton v. Sherman, 20 Iowa, 295; Arledge v. Rooks, 22 Ark. 427; Guthrie v. Thompson, 1 Ore. 353; Taylor v. Longworth, 14 Pet. (U. S.) 172; Paul v. Brown, 9 Minn. 157.

[50] Parker v. Parmlee, 20 Johns. (N. Y.) 130; Hunt v. Livermore, 5 Pick. (Mass.) 395; Thomas v. Lanier, 23 Ark. 639; Davidson v. Van Pelt, 15 Wis. 341.

[51] Longfellow v. Moore, 102 Ill. 289.

[52] Holland v. Holmes, 14 Fla. 390; Burwell v. Jackson, 9 N.Y. 544.

[53] Hoffman v. Fett, 39 Cal. 109.

[54] Page v. Greely, 75 Ill. 400.

their former efficacy; and although it is still necessary to effectuate a conveyance that it contain apt words evincing an intention to convey,[55] yet every part of the instrument may be resorted to for the purpose of ascertaining its true meaning;[56] and generally any writing that sufficiently identifies the parties, describes the land and acknowledges a sale of the vendor's rights, if executed in conformity to law, is a good and valid deed of bargain and sale.[57] The attention of the purchaser is now mainly directed to the condition of the vendor's title, and if this is perfect in the person proposing the same, the vehicle of conveyance does not so much matter. An ordinary quitclaim is fully as effectual for transferring title as a technical deed of bargain and sale,[58] and will pass to the grantee all the present estate or interest of the grantor,[59] together with the covenants running with the land,[60] unless there be special words limiting and restricting its operation. Hence, a contract to convey a perfect title by a "good and sufficient" deed may be fully performed by making a quitclaim deed;[61] provided, of course, that such deed conveys the entire estate[62] and vests in the purchaser an indefeasible title.[63] Neither the implied nor expressed covenants add anything to the title or in any way enlarge the estate granted save as they may affect future acquisitions by way of estoppel, and they are usually inserted only for the purpose of personal indemnification; while the fact that parties have made a written agreement for a sale without providing for any covenants certainly tends to indicate that they did not intend there should be any.[64]

Although there is a manifest impropriety in permitting local usage or custom to influence the terms of an express contract,

[55] McKinney v. Settles, 31 Mo. 541.

[56] Saunders v. Hanes, 44 N. Y. 353; Collins v. Lavalle, 44 Vt. 230.

[57] Chiles v. Conley's Heirs, 2 Dana (Ky.), 21.

[58] Morgan v. Clayton, 61 Ill. 35; Rowe v. Becker, 30 Ind. 154; Pingree v. Watkins, 15 Vt. 479.

[59] Nicholson v. Caress, 45 Ind. 479; Carter v. Wise, 39 Tex. 273.

[60] Brady v. Spruck, 27 Ill. 478.

[61] Kyle v. Cavanagh, 103 Mass. 356; Thayer v. Torrey, 37 N. J. L. 339; and see Bagley v. Fletcher, 44 Ark. 153.

[62] Taft v. Kessel, 16 Wis. 273.

[63] Delevan v. Duncan, 49 N. Y. 485; Davis v. Henderson, 17 Wis. 105; Parker v. Parmlee, 20 Johns. (N. Y.) 130.

[64] Johnston v. Mendenhall, 9 W. Va. 112.

particularly in sales of land, courts have sometimes interposed to supply deficiencies or omissions in such contracts; and it has been held that under a contract for conveyance which is silent as to the character of the deed to be given, the purchaser is entitled to a deed with such covenants as are usual by the custom of the place where the land lies;[65] and the principle is also recognized in many of the states that a vendor who makes a sale of lands for his own benefit can, in general, be required to give a covenant of general warranty.[66] But these decisions do not affect the general principle first stated, and notwithstanding they have been made in the interests of justice and fair dealing their propriety may well be questioned. Where parties desire and intend that the conveyance shall be with covenants they should so stipulate; for if a conveyance is tendered in all respects efficient to convey the title and all the grantor's interest in the property, the imposition of any further duties in respect thereto or the assumption of any burdens in connection therewith should be the subject of a distinct and clearly expressed agreement.

Where the contract provides for a warranty deed this is generally understood as meaning the five covenants now usually inserted in deeds of bargain and sale.

A contract to give a "good and sufficient" deed of conveyance, whether with or without warranty, calls for an operative conveyance—one not merely good in form, but in substance as well, and which carries with it the title to the land; and even though the deed may be with covenants of warranty it seems that it is not sufficient if the vendor has no title or only an imperfect one.[67] The mere giving of a warranty deed is not regarded as a compliance with a covenant to convey by that form of deed where the title is incumbered or otherwise defective.

§ 352. **Re-execution of lost deeds.** Under the operation of our recording laws, deeds and other instruments of conveyance are not guarded with the same care as in England and

[65] Gault v. Van Zile, 37 Mich. 22.

[66] Faircloth v. Isler, 75 N. C. 551; Allen v. Hazen, 26 Mich. 143; Linn v. Barkly, 7 Ind. 70; Vanda v. Hopkins, 1 J. J. Marsh. (Ky.) 293; Clark v. Lyons, 25 Ill. 105; Herryford v. Turner, 67 Mo. 296; Johnston v. Piper, 4 Minn. 195; Witter v. Biscoe, 13 Ark. 422.

[67] Everson v. Kirtland, 4 Paige (N. Y.) 628.

other countries where no general system of public registration prevails. Indeed but few proprietors can produce other of the title deeds of their lands than the immediate instrument by which they acquired same and, in many cases, where long possession has intervened, even this not infrequently becomes lost. If the instrument has been recorded no evil effect will usually result from the loss unless the record is itself destroyed.

But it may happen that after the purchase price has been paid, and the purchaser let into possession, the operative instrument of conveyance is lost or destroyed without having been placed of record. In such event, the vendor having discharged the legal duties imposed upon him, what remedy is left to the vendee who by accident or misfortune is thus unable to assert a paper title? Undoubtedly he might resort to the aid of equity to restore the lost deed,[68] but this, it seems, will not be the only way of escape from his dilemma, for, as it would be inequitable in such a case for the vendor to retain the record title, a court of chancery, acting within its general jurisdiction, may compel the vendor to execute a new deed.[69]

[68] See Hord v. Baugh, 7 Humph. (Tenn.) 576; Lancy v. Randlett, 80 Me. 169; Griffin v. Fries, 23 Fla. 173.

[69] Kent v. Church, 136 N. Y. 10; Cummings v. Coe, 10 Cal. 259.

CHAPTER XIII.

CONSTRUCTION OF DEEDS.

§ 353. General rules.
354. Construction in favor of grantee.
355. Ambiguities and inconsistencies.
356. The premises.
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358. The parties.
359. Presumption as to grantee —Persons of same name.
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§ 353. General rules. It is a fundamental rule in the construction of deeds that effect must be given to the intent of the parties when it is plainly and clearly expressed, or can be collected or ascertained from the instrument, and is not repugnant to any rule of law.[1] Technical rules of construction are never to be resorted to where the meaning is plain and obvious;[2] and in the exposition of deeds the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect.[3] So, too, while courts cannot give effect to an instrument in writing so as to do violence to the rules of language or to the rules of law, yet they are to give it such a construction as will bring it as near to the actual meaning of the parties as the words which they have seen fit to employ and the rules of law will permit.[4]

[1] Flagg v. Eames, 40 Vt. 16; Carson v. McCaslin, 60 Ind. 337; Lehndorf v. Cope, 122 Ill. 317; Bent v. Rogers, 137 Mass. 192.

[2] Noyes v. Nichols, 28 Vt. 159; Huntington v. Lyman, 138 Mass. 205; Kimball v. Semple, 25 Cal. 449.

[3] Jackson v. Meyers, 3 Johns. (N. Y.) 383; Dickens v. Barnes, 79 N. C. 490; Jackson v. Sharp, 27 Wis. 472; Higginbothan v. Stoddard, 72 N. Y. 99; Cooper v. Cooper, 76 Ill. 60; Pike v. Monroe, 36 Me. 309.

[4] It not infrequently happens that instruments cannot have the effect intended by the parties, but effect is given to them in another way consistently with such intention. The rule is "that they shall operate according to the intention of the parties, if by law they may, and, if they cannot operate in one form,

A deed will be construed according to its apparent intent where the language is defective,[5] and, if necessary, the clauses of a deed may be rejected or transposed so as to give it its apparent construction.[6]

As a general rule, the rights of the parties to a deed must be ascertained from the words of the instrument; but this rule is subject to the modification that surrounding circumstances may be taken into consideration,[7] the particular situation of the parties, and the state of the thing granted.[8]

Where vagueness or uncertainty may seem to exist, evidence *aliunde* may be resorted to; and if with the aid of extrinsic facts and circumstances[9] the intent of the parties can be ascertained with reasonable certainty, the conveyance will be sustained.[10] On the other hand, where the language employed is so uncertain that the intention of the parties cannot be discovered, the deed is void; and this whether the uncertainty has reference to the person of the grantee or the description of the thing granted.

Questions of construction arise most frequently with respect to the property conveyed and the extent and duration of the estates therein created; and as these matters are made the subjects of subsequent chapters, where they are treated in

they shall operate in that which by law shall effectuate the intention." Peckham v. Haddock, 36 Ill. 38; Litchfield v. Cudworth, 15 Pick. (Mass.) 23.

[5] Cumberland, etc. Ass'n v. Aramingo, etc. Church, 13 Phil., (Pa.) 171; Lehndorf v. Cope, 122 Ill. 317.

[6] Staton v. Mullis, 92 N. C. 623; Anderson v. Baughman, 7 Mich. 69.

[7] Courts must give a common-sense construction to grants, and will consider the state of things and the considerations in view of the parties at the time the grant is made, which move them to its execution and acceptance. Louisville, etc. R. R. Co. v. Koelle, 104 Ill. 455; and see Treat v. Strickland, 2 Me. 234; Truett v. Adams, 66 Cal. 218.

[8] Batavia Mfg. Co. v. Newton Wagon Co. 91 Ill. 230; Hadden v. Shoutz, 15 Ill. 581; Mulford v. Le Franc, 26 Cal. 88; Dunn v. English, 23 N. J. L. 126; Abbott v. Abbott, 53 Me. 356; Pollard v. Maddox, 28 Ala. 325.

[9] It has been held that, in construing the language of a deed, the court must assume that the parties to the deed stood upon the ground and had all the lands and boundaries, natural and artificial, as well as lands of adjoining owners, in full view at the time. Wendell v. Jackson, 8 Wend. (N. Y.) 183.

[10] Peck v. Mallams, 10 N. Y. 532; Walch v. Ringer, 2 Ohio, 327; Gano v. Aldridge, 27 Ind. 294; Anderson v. Baughman, 7 Mich. 69.

detail, no attempt will be made in the subsequent paragraphs to elucidate any points or determine any questions growing out of the descriptions of lands or the creation of estates.

§ 354. **Construction in favor of grantee.** It will sometimes happen that, by reason of peculiar circumstances and conditions which practically preclude any other view, a deed must be construed most strongly in favor of one of the parties in respect to the thing granted and the estate conveyed, and the rule is that in such cases such a construction shall be had as is most favorable to the grantee.[11] But such construction is the last one to which courts apply, and ought never to be resorted to so long as a satisfactory result can be reached by other rules;[12] and is not applicable to any case but one of strict equivocation, where the words used will bear either one of two or more interpretations equally well.[13]

The rule is based upon the principle that a deed should never be held void when the words may be applied to any intent to make it good, and to that end they are to be taken most strongly against the grantor; for he should not be allowed to say a description framed by himself was so indefinite that no title to the property could be acquired.[14]

The rule governing controversies between grantor and grantee, by which the language of a conveyance is required to be taken most strongly against the grantor, has no application when the dispute occurs between parties claiming under the same conveyance and who are each entitled to the benefit of the same rule of construction.[15] Nor is it applicable to a deed with statutory and express covenants, as it is a rule of equal force that all statutes in derogation of the common law must be construed strictly.[16]

§ 355. **Ambiguities and inconsistencies.** The proposition is fundamental that the construction of all deeds must be favorable and as near the minds and intents of the parties as the rules of law will admit,[17] the entire instrument being duly

[11] People v. Storms, 97 N. Y. 364; Hager v. Spect, 52 Cal. 579; Mills v. Catlin, 22 Vt. 98; Winslow v. Patten, 34 Me. 25; Watson v. Boylston, 5 Mass. 411.

[12] Flagg v. Eames, 40 Vt. 16.

[13] Albee v. Huntly, 56 Vt. 458.

[14] People v. Storms, 97 N. Y. 364.

[15] Coleman v. Beach, 97 N. Y. 545.

[16] Finley v. Steele, 23 Ill. 56.

[17] Fish v. Hubbard, 24 Wend. (N. Y.) 654; Brookman v. Kurz-

surveyed and the various parts so adapted and construed that the whole, if possible, may stand.[18] Where the description of the parties or property is ambiguous, or where there is inconsistency in the several particulars, words, if necessary, may be supplied by intendment, and particular clauses and provisions qualified, transposed or rejected in order to give effect to apparent intention.[19] What words or clauses shall be rejected or qualified in case of uncertainty is frequently determined by giving effect to those parts or clauses which are most certain, and to particulars in respect of which the parties would be least likely to have made a mistake.[20]

It is an old rule that, in the construction of deeds, the earlier clauses control the later ones; but this rule, in effect, is practically abrogated, or if employed is only resorted to when reconcilement becomes impossible. The later and better rule would seem to be that inconsistencies are to be reconciled if possible;[21] and while the former rule may still be applied where a subsequent clause would defeat the grant, it is never permitted to prevail where there is room for construction.[22] If it is the clear intent of the grantor that apparently inconsistent provisions of a deed shall all stand, such limitations upon and interpretation of the literal signification of the language used will be imposed as will give effect, if possible, to all of its provisions.[23] On the other hand, where the intention of the parties is decisively shown from one clause, the intention thus shown will control, notwithstanding ambiguities and inconsistencies in other clauses.[24]

It is a further rule, of general application, that a manifest general intent will control a particular intent.

§ 356. **The premises.** Technically the premises of a deed is

man, 94 N. Y. 273; Bent v. Rogers, 137 Mass. 192; Waterman v. Andrews, 14 R. I. 589; Bryan v. Bradley, 16 Cond. 474.

[18] Booth v. Mill Co. 74 N. Y. 21; Parker v. Nichols, 7 Pick. (Mass.) 111; Salisbury v. Andrews, 19 Pick. (Mass.) 250.

[19] Hathaway v. Power, 6 Hill (N. Y.), 453; Anderson v. Baughman, 8 Mich. 60; Riggin v. Love, 72 Ill. 556.

[20] Case v. Dexter, 106 N. Y. 548; Bent v. Rogers, 137 Mass. 192.

[21] Waterman v. Andrews, 14 R. I. 589.

[22] Tucker v. Meeks, 2 Sweeney (N. Y.), 736.

[23] Coleman v. Beach, 97 N. Y. 545; Salisbury v. Andrews, 19 Pick. (Mass.) 250.

[24] Bent v. Rogers, 137 Mass. 192.

everything which precedes the *habendum,* and includes the most material and operative parts of the instrument. The date, where the instrument takes the form of an indenture, is always placed at the beginning of the premises, but is generally regarded as the least material part. It is customary to insert it, and good conveyancing requires that it should be stated; yet, as a matter of law, the date is no part of the substance of the deed and is not necessary to its operation or effect.[25] Though the expressed date of a deed is immaterial to its operation and effect, and may under ordinary circumstances be contradicted and explained, yet, when taken in connection with conditions or stipulations annexed to the grant, it may become important in fixing the time for the performance of any act by grantor or grantee, and in such case cannot be varied by parol.[26] The date of a deed, in the absence of other proof, is presumed to be the true date of its execution[27] as well as delivery;[28] but should the instrument be without date, the date of acknowledgment may be presumed as indicative of the time of the performance of those acts.[29]

The premises also contain the names of the parties, the consideration recitals, the operative words of conveyance, and the description of the property conveyed, each of which will be duly considered in its appropriate place.

In common parlance the lands conveyed are frequently spoken of as the premises. This expression has obtained currency largely through a misapprehension of its import by the laity. The description being placed in the premises it has long been customary for lawyers, whenever occasion arose for a reference to the description, instead of repeating the verbiage of the grant to refer to it simply as the premises.

[25] Jackson v. Schoonmaker, 2 Johns. (N. Y.) 234; Meach v. Fowler, 14 Ark. 29; Costigan v. Gould, 5 Denio (N. Y.), 290; Blake v. Fish, 44 Ill. 302; Thompson v. Thompson, 9 Ind. 323. It is said that formerly deeds were not dated, for the reason that a deed dated before the period of prescription, which was constantly changing, was supposed not to be pleadable. But ever since Edward II. it has been customary to date them. 4 Cruise, 216.

[26] Joseph v. Biglow, 4 Cush. (Mass.) 82.

[27] Darst v. Bates, 51 Ill. 439; Smith v. Porter, 10 Gray (Mass.), 66.

[28] Hardin v. Crate, 78 Ill. 553.

[29] Gorman v. Stanton, 5 Mo. App. 585.

The laity, observing the custom but not understanding its meaning, then came to regard it as indicating land itself, and so the phrase passed into common speech. Thus, it is by no means infrequent to see a card in the window of a house which announces that the "premises" are to let. The author would not have volunteered this bit of elementary law were it not that many lawyers seem to be employing the term in the same incorrect manner. The word "premises" when used in legal phraseology relating to land always refers to the description of the land and not to the land. That is, it is not synonym for land, but only of the land as described in the deed, and is practically meaningless if used in any other way. However, as custom makes law, and as the expression is most convenient and compendious, it may be that it will eventually come to represent not the terms by which land is described but land itself, without reference to its description. Indeed, we occasionally find the word used in this manner by courts.

§ 357. **Recitals.** The recitals of a deed being unnecessary to its validity, either at law or in equity, are never permitted to control its operation or limit its construction.[30] They may be of use to explain a doubt of the intention or meaning of the parties, but the deed must have the effect which its operative words import regardless of any language inserted merely by way of recital.[31] The most that can be claimed for them is an operation by way of estoppel, and in this particular they are generally held to be effectual.[32]

§ 358. **The parties.** Considerable space has already been devoted to a consideration of the subject of the parties to a conveyance of land, and as to who are and who are not capable of contracting, as well as the manner in which a valid contract may be made. It is not intended, therefore, to repeat here any part of what has been said with respect to the capacity of parties or methods of contracting, but to point out the essentials of the conveyance with respect to the manner in

[30] Huntington v. Havens, 5 Johns. Ch. (N. Y.) 23.

[31] Moore v. Griffin, 22 Me. 350; Clark v. Post, 113 N. Y. 17; Walker v. Tucker, 70 Ill. 527. It was formerly customary to insert a history of title, or special matters which formed the inducement of the conveyance, by way of recital. At present such recitals are almost wholly confined to official deeds.

[32] Stow v. Wise, 7 Conn. 214. See Peck v. Hensley, 20 Tex. 673.

which such contracting parties should be distinguished and identified. To make a valid and effectual conveyance by grant it is essential that the name of the grantor shall be inserted in the premises, together with apt words showing an intention to convey, and it seems that merely signing a deed is not sufficient if the name of the person so signing appears nowhere else.[33] On this point, however, the authorities are not agreed and some cases announce a contrary rule.[34]

It is further essential to the validity of every conveyance that it be to a grantee capable of taking and of proper identification; and while it is not essential that the grantee shall actually be named, yet if not named he must be so described as to make him capable of designation.[35] There is perhaps a necessary uncertainty in writings, involved in their application, both as to persons and things described therein, and parol proof is sometimes absolutely indispensable to fix the identity of the person intended or the thing concerning which the parties propose to contract; yet a written contract, in order to comply with the statute, must be in some sense self-sustaining. "It would be mere folly," as was said in one case, "to make a conveyance to my next-door neighbor, or to the person now sitting at the table with me, by this description instead of by name, and the law could hardly be expected to enforce such a conveyance." The description of the parties, therefore, is equally as important as that of the property, and should be of such a character as to leave no doubt as to the person or persons intended.

The rules relating to designation and capacity are fundamental, and hence a deed to the heirs of a living person named therein, without giving the names of the heirs, would be a nullity and pass no title to any one;[36] so, too, of a deed to a

[33] Stone v. Sledge, 87 Tex. 49; Peabody v. Hewitt, 52 Me. 33; Purcell v. Gashorn, 17 Ohio, 105; Harrison v. Simmons, 55 Ala. 510.

[34] See Armstrong v. Stovall, 26 Miss. 275; Elliot v. Sleeper, 2 N. H. 525.

[35] Simmons v. Spratt, 20 Fla. 495; Newton v. McKay, 29 Mich. 1.

[36] Hall v. Leonard, 1 Pick. 27; Winslow v. Winslow, 52 Ind. 8; Morris v. Stephens, 46 Pa. St. 200. In a similar case in Tennessee, however, it was held that the word "heirs" should not be taken in its technical signification, but to mean "children," and that the deed took effect as a present grant. See Grimes v. Orrand, 2 Heisk. (Tenn.) 298. So, too, it has been determined in a number of cases, that the word "heirs," notwithstanding

corporation which has no legal existence.[37] But courts, in the application of these rules, are ever inclined to a liberal interpretation; and although no grantee be named, if the grant be made for a specific use, a trust will often be created which a court of equity will protect, and, if necessary, appoint a trustee and compel a conveyance to him of the legal title.[38]

A conveyance to John Smith & Co. would at law have the effect to vest title in John Smith alone; for the several members of a firm cannot be regarded, in the view of a court of law, as holding real estate as tenants in common, unless it be conveyed to them as such by name.[39] So, also, a conveyance to Thomas Barnett & Bro. has been held to vest title in Thomas Barnett only, and that a conveyance from him would give to his grantee a valid title to the entire estate.[40] It is not contended, however, that such a deed would be altogether void in respect to the unnamed members of the partnership, but simply that it would be without legal operation as to them; for it seems that while a firm name is not usually considered a sufficient designation of unnamed parties in law, it may nevertheless be regarded as a latent ambiguity which may be explained by parol;[41] while in equity the partner thus specifically named would be treated as holding the legal title in trust for the partnership.[42] A grant to John Smith & Son, however, would be effective as in this instance one of the grantees, though not specifically named, is yet sufficiently described to admit of identification,[43] and, upon the same principle, a grant to one by name and his "Bro." would seem to

its primary meaning, is susceptible of more than one interpretation, and while the rule, as stated in the text still holds good, yet when it is apparent from the instrument itself and the surrounding circumstances that in using the word the grantor meant children, courts may so construe it and thus give effect to the instrument. Heath v. Hewitt, 127 N. Y. 166; Huss v. Stephens, 51 Pa. St. 282.

[37] Douthitt v. Stinson, 63 Mo. 268; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73.

[38] Bailey v. Kilburn, 10 Met. (Mass.) 176.

[39] Arthur v. Webster, 22 Mo. 378; Winter v. Stock, 29 Cal. 407; Gassett v. Kent, 19 Ark. 607; Moreau v. Saffarans, 3 Sneed (Tenn.), 595.

[40] Barnett v. Lachman, 12 Nev. 361.

[41] Murry v. Blackledge, 71 N. C. 492.

[42] Moreau v. Saffarans, 3 Sneed (Tenn.), 595.

[43] As a general rule grantees may always take under the general designation of "sons," "daughters" or "children."

be sufficient, but, in the case above referred to, the court held otherwise.

A misnomer will not ordinarily defeat a grant; and a deed to a party by a wrong baptismal or christian name may yet suffice to vest title in the intended grantee,[44] extrinsic evidence being admissible to explain mistakes or prove identity;[45] and if upon a view of the whole instrument the grantee is pointed out, the grant will not fail, even though the name of baptism is not given at all.[46] Where father and son bear the same name, unless explained, the grant will be taken as one to the father.[47]

The grantor in a deed is usually indifferent as to who the grantee is, where he receives the consideration money for the land conveyed, and the designation of such grantee is usually controlled by the will of the person with whom he negotiates and from whom he receives the pay; but unless, from the testimony, it appears that he is thus willing to be controlled, the grantor's intention is the proper subject of inquiry in determining who the grantee is, where the deed is so drawn as to be sufficient to convey the title to either one of two parties.[48]

§ 359. **Presumption as to grantee—Persons of same name.** Notwithstanding that similarity of names is common, and that not infrequently the same name is borne by a number of different parties living in the same community, it is rare that any attempt is made to assume ownership without a claim of right simply by reason of possessing a name identical with that of a record grantee. In the cases where the question as to ownership has arisen the contests have mainly been between father and son, and dependent upon peculiar circumstances. Where two persons bear the same name a designation of character,

[44] Staak v. Sigelkow, 12 Wis. 234. But see Crawford v. Spencer, 8 Cush. (Mass.) 418.

[45] Peabody v. Brown, 10 Gray (Mass.), 45.

[46] Newton v. McKay, 29 Mich. 1; Scanlan v. Wright, 13 Pick. (Mass.) 523.

[47] Stevens v. West, 6 Jones (N. C.), 49; Padgett v. Lawrence, 10 Paige (N. Y.), 170. The word "Jr." forms no part of the name of the person to whose name it is usually affixed, but is merely descriptive of the person intended, and is usually adopted to describe the son where father and son both have the same christian name as well as family name. Id.

[48] Diener v. Diener, 5 Wis. 483.

as "Sr.," "Jr.," "2d," etc., or possibly a recital of the place of residence, may become an efficient means of pointing out the true person meant; yet, as a matter of law, the terms "Junior" or "Senior" have no particular significance or controlling efficacy.

Where a father and son have the same name, and a conveyance of land is made without designating whether to the father or the son, the law will presume that the father was intended for the grantee in the absence of proof to the contrary;[49] and it devolves on the son or the party claiming under him to introduce evidence sufficient *prima facie* to overcome or rebut this presumption. Should this be done, however, the *onus* will be shifted to the party claiming under the father, and he will be bound to produce proofs sufficient to overcome or at least equal in probative force the case of the adverse party.[50] Where a deed has been made to one of two persons of the same name—the one the father and the other the son—both living together and occupying the lands conveyed, the character and circumstances of the occupancy, as bearing upon the question as to who was intended to take the grant, are proper subjects for consideration.[51]

§ 360. **Consideration.** It was essential to the validity and operation of deeds of bargain and sale under the statute of uses that they should be given for a pecuniary consideration, which was required to be expressed in the deed or proved independently of it. In modern conveyancing the principle has to a great extent been retained; but any consideration that is valuable, though merely nominal, will be sufficient, nor is it necessary that it take the shape of money.[52]

Gratuitous or voluntary conveyances are valid and effective as between the parties and all others whose rights are not injuriously affected thereby; but whenever a deed is assailed by one who lawfully claims a right or interest in the property conveyed adverse to the grantee, it must, to insure validity, be supported by an adequate consideration. "Good" consider-

[49] Graves v. Colwell, 90 Ill. 612; Padgett v. Lawrence, 10 Paige (N. Y.), 170; Stevens v. West, 6 Jones, L. (N. C.) 49.

[50] Graves v. Colwell, 90 Ill. 612.

[51] Graves v. Colwell, 90 Ill. 612.

[52] Smith v. Allen, 5 Allen (Mass.) 454; Charleston, etc. R. R. Co. v. Leech, 33 S. C. 175; Pool v. Docker, 92 Ill. 501; Zane v. Zane, 6 Munf. (Va.) 406; Pierson v. Armstrong, 1 Iowa, 282.

ations, as those of blood, natural affection, etc., although meritorious, are not usually permitted to be effective in such cases; and, as a rule, to maintain a deed against the attack of creditors, owners of prior equities, etc., it must be founded upon some consideration which the law deems valuable. The value consists of some benefit conferred upon the party by whom the promise is made or upon a third party at his request, or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made.

Money is always considered a valuable consideration; but marriage,[53] agreements for support,[54] past illicit cohabitation,[55] extinguishment of antecedent debts[56]—although with respect to this many authorities are to the contrary[57]—and generally any act or thing which comes within the definition first given and is adequate or commensurate with the value of the land conveyed, will be sufficient to give effect to the deed.[58]

The subject is of vital importance whenever a conveyance is assailed as fraudulent, and its different phases will be considered in detail when we shall come to treat of that class of conveyances.

It is customary and proper to recite in the deed the consideration paid for the land and the rules of good conveyancing would be infringed were such recital omitted. Such recital, however, is not conclusive either as to the amount paid or its receipt by the vendor. It may be shown that the real consideration was of a different amount from that expressed in the deed,[59] or even of an entirely different character.[60] As between

[53] Smith v. Allen, 5 Allen (Mass.), 454; Verplank v. Sterry, 12 Johns. (N. Y.) 536; Whelan v. Whelan, 3 Cow. (N. Y.) 537; Elfinger v. Crowl, 17 Md. 361.

[54] Hutchinson v. Hutchinson, 46 Me. 154; Exum v. Canty, 34 Miss. 533; Shontz v. Brown, 27 Pa. St. 123.

[55] Doe v. Horn, 1 Ind. 363.

[56] Ruth v. Ford, 9 Kan. 17; Love v. Taylor, 26 Miss. 567; Frey v. Clifford, 44 Cal. 335; West v. Naylor, 93 Ind. 431; Safford, v. Wade, 51 Ala. 214.

[57] See Johnson v. Graves, 27 Ark. 557; Chance v. McWhorter, 26 Ga. 315; Brown v. Vanlier, 7 Humph. (Tenn.) 249; Wood v. Robinson, 22 N. Y. 564; Mingus v. Condit, 23 N. J. Eq. 313.

[58] Wood v. Beach, 7 Vt. 522; Jackson v. Leek, 19 Wend. (N. Y.) 339; Busey v. Reese, 38 Md. 264.

[59] Bowen v. Bell, 20 Johns. (N. Y.) 338.

the parties it may be shown that the vendee has failed to pay the sum expressed,[61] or that he has agreed to pay an additional amount contingent upon some future event or transaction.[62] This results from the fact that the agreement by the vendee to pay for the land sold is not within the statute of frauds,[63] and hence, the vendor, although the contract has been executed on his part by conveyance, may still maintain an action upon the agreement and establish his claim by parol testimony.

§ 361. **The habendum.** The office of the *habendum* in a deed is to limit with certainty the estate previously conveyed by the premises. It cannot be made to effect the conveyance of anything not mentioned in the premises; nor can it change the character of the estate thereby conveyed, or divest an estate already vested; and, in general, is void if repugnant to the estate granted.

But where no estate is mentioned in the granting clause, then the *habendum* becomes efficient to declare the intention of the parties, and will rebut any implication which would otherwise arise from the omission in this respect in the preceding clause. So, also, where the granting clause in a deed merely describes the property and does not define the nature or character of the estate granted, and is not followed by language assuming to supply what is thus omitted, it results by legal implication under the statute relating to conveyances, as enacted in most of the states, that the estate is a fee; but where the *habendum* describes what estate is conveyed, it does not contradict the language of the granting clause, but simply supplies what is omitted therefrom and removes all necessity for resorting to implication to ascertain the intention of the parties.[64] When it is clear from the whole instrument and attendant circumstances that the grantor intended the *habendum* to operate as an addendum or proviso to the granting

[60] McCrea v. Purmort, 16 Wend. (N. Y.) 460.

[61] Shepard v. Little, 14 Johns. (N. Y.) 210.

[62] As that upon a resale he would pay a portion of the proceeds that might be received in excess of amount paid by him; Miller v. Kendig, 55 Iowa 174; Linscott v. McIntire, 15 Me. 201; or even the whole of such proceeds; Hall v. Hall, 8 N. H. 129.

[63] Thomas v. Dickerson, 12 N. Y. 364.

[64] Riggin v. Lowe, 72 Ill. 553.

clause, and to control the same to the extent of limiting the estate conveyed, the *habendum* must control.[65]

So, too, while no person can take a present estate under a deed unless named therein as a party, and while the *habendum* can never introduce one who is a stranger to the premises to take as grantee,[66] yet, where the grantee's name has been omitted in the premises, if the *habendum* be to him by name, he takes as a party and the defect is cured.[67]

§ 362. **Testamentary writings.** While it is a generally-conceded rule that a grantor may make a valid present conveyance of an estate to commence *in futuro,* yet such deeds must be carefully distinguished from instruments of a testamentary character and revocable at the option of the grantor. A will which is effective as a conveyance only at the maker's death is, from its own nature, ambulatory and revocable during his life; and it is this ambulatory quality which forms the chief characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting of an estate, until the death of the disposing party, yet the postponement in such case is produced by express terms, and does not result from the nature of the instrument.

The reported cases have a tendency to leave this subject somewhat in doubt, the more advanced cases assuming positions greatly in derogation of common-law rules, and opposed in many instances to decisions arrived at upon substantially the same facts. The volume of authority, however, sustains the doctrine that an instrument in form a deed and purporting to convey land, but providing that the property shall remain the grantor's during life, the deed taking effect only at his decease, is a mere devise, revocable at will, and passes no title.[68]

[65] Bodine's Admrs. v. Arthur, 91 Ky. 53.

[66] Blair v. Osborne, 84 N. C. 417.

[67] Lawe v. Hyde, 39 Wis. 346.

[68] Bigley v. Souvey, 45 Mich. 370. An instrument in form a deed, and providing that "this deed not to take effect until after my death," and directing the beneficiary to pay the maker's debts, *held* not to be a deed, but to be testamentary in its character. Cunningham v. Davis, 62 Miss. 366. So, too, a conveyance in the usual form, but containing the words "to commence after the death of both of said grantors," and "it is hereby understood and agreed between the grantors and grantee that the grantee shall have no interest in

The form of the instrument is of comparatively little moment for almost every conceivable form of writing by which men have attempted to convey, bind, or declare the legal *status* of property have been adjudged to be wills, and in arriving at a conclusion as to whether a written instrument, doubtful in its character, but posthumous in its operation, is a deed or will, the controlling inquiry is the intention of the maker,[69] to be gathered primarily from the language of the instrument itself. The attending circumstances may also be shown in evidence as aids in determining whether the maker intended that the paper should operate as a deed or a will,[70] and if from all such evidence it appears that the maker did not intend that any interest should vest before his death, the instrument should be deemed a will. It is the application of this fundamental rule, however, which has produced the larger part of the uncertainty which surrounds conveyances of the character now under consideration, and while all courts and jurists are agreed upon the primary proposition that the manifest intent of the grantor must govern and that the language used must fix and determine this intent, yet in its practical application to conceded facts a wide diversity of opinion is shown.

Where a deed conveys a present interest in land, such deed cannot be treated as of a testamentary character and its limitations revoked by the grantor.[71] Nor will the fact that the right of possession is postponed until after the grantor's

the said premises as long as the grantors or either of them shall live." *held* not to create a present estate to commence *in futuro*, but to be in the nature of a will revocable at the grantor's option. Leaver v. Gauss, 62 Iowa 314. And see Watkins v. Dean, 10 Yerg. (Tenn.) 320; Evans v. Smith, 28 Ga. 98; Craven v. Winter, 38 Iowa 478. The case of Leaver v. Gauss, 62 Iowa 314, used the language, "to commence after the death of the grantors, it being understood between the grantors and the grantee that the grantee shall have no interest in the premises as long as the grantors, or either of them, shall live," and it was held that the provision in that instrument was testamentary in its character, and revocable at any time by the grantor.

[69] Simon v. Wildt, 84 Ky. 157; Sharp v. Hall, 86 Ala. 110. Intention is an inferential act, and, unless announced at the time the act is done, is not susceptible of direct proof.

[70] Gilman v. Master, 42 Ala. 365; Gage v. Gage, 12 N. H. 371.

[71] Mattocks v. Brown, 103 Pa. St. 16.

decease affect its operation as an absolute grant.[72] There are authorities which hold that a writing may be partly a deed and partly a will,[73] but, as a rule, any instrument which passes the right of property during the donor's life time, although of an alleged testamentary character, being not absolutely a will, must be regarded as a deed, for there is no middle ground.[74]

There is another class of cases which hold that, inasmuch as livery of seizin has been abolished and deeds of feoffment have fallen into disuse, the reason for the rule which formerly prevented the creation of estates *in futuro* without some intermediate estate to support them has ceased, and with it the rule itself has practically ceased to have any effect.[75] Under these decisions, where there has been a delivery of the deed, notwithstanding that by express terms it is to have no effect until the grantor's death, it will still be considered as a valid and operative conveyance, the fee in remainder vesting on delivery. The theory upon which these decisions proceed is that, where parties have clearly expressed their intentions by their written contract, and it is based on a sufficient consideration, and no rule of public policy has been contravened, such agreement should be enforced unless some stern and inflexible rule of law prevents.[76] It is further held that by giving effect to such conveyances the grantor is estopped by his covenants, and stands seized to the use of the grantee as in other deeds of bargain and sale; that such a course simply carries into

[72] A conveyance to a trustee, the property to be applied to the grantor's support and maintenance during life, and at his death to be divided among certain named persons, is a deed and not a will, and cannot be revoked. It takes effect at once. McGuire v. Bank of Mobile, 42 Ala. 589.

[73] See Burlington University v. Barrett, 22 Iowa 60.

[74] Hileman v. Bouslaugh, 13 Pa. St. 344.

[75] If, as it was at the ancient common law, livery of seizin were indispensable to the investiture of title in the grantee, then under the highly artificial rules which then prevailed there can be no doubt that there should be not only a particular estate to support the remainder, but livery of seizin to the tenant. As a remainder-man was not entitled to possession, and the fee could not vest without livery, to avoid the difficulty by a fiction the livery was made to the tenant holding the particular estate; and that was held to be livery of seizin to the remainder-man.

[76] Shackelton v. Sebree, 86 Ill. 616; Ferguson v. Mason, 60 Wis. 377.

effect the intention of the parties, working injury to none and infringing no rule of public policy.[77]

§ 363. **Deed construed as a mortgage.** The authorities all agree in declaring that a deed absolute upon its face, but intended as a security for the payment of money, is only a mortgage. This rule is allowed to prevail, even at law, where the deed is accompanied by a separate contemporaneous agreement in writing to reconvey upon the payment of the debt,[78] while in equity parol evidence may be resorted to to prove the facts which establish the true nature of the transaction.[79] It is to be observed, however, that the rule of equity which admits parol evidence in cases of this kind prevails only to the extent of allowing evidence of the intention of the parties at the time of the execution of the deed, and the proof must establish an agreement substantially contemporaneous therewith.[80] The proof of such agreement cannot rest merely on the subsequent admissions of the mortgagee;[81] nor does it seem that a subsequent mutual agreement to that effect is enough unless it be in writing and formally executed.[82]

[77] Shackelton v. Sebree, 86 Ill. 616. It has been held that where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor's decease, and not then if the grantee does not survive him, but if the grantee does survive it is to convey the premises in fee-simple, with words appropriate and consistent with this provision in the *habendum* and covenants, it will be upheld as creating a feoffment to commence *in futuro*, and will give the estate in fee-simple to the grantee on the happening of the contingency named; the execution and record of the deed operating in the same manner as a livery of seizin at the grantor's decease. Abbott v. Holway, 72 Me. 298.

[78] Teal v. Walker, 111 U. S. 242; Lanahan v. Sears, 102 U. S. 318; Haines v. Thompson, 70 Pa. St. 434. But on a sale and deed of lands an agreement, which is only an independent contract by the vendee to reconvey the lands to the vendor on certain conditions, does not make the deed a mortgage. Horbach v. Hill, 112 U. S. 144.

[79] Raynor v. Lyons, 37 Cal. 452; Moffitt v. Rynd, 69 Pa. St. 380; Lindman v. Cummings, 57 Ill. 195; Morris v. Nixon, 1 How. (U. S.) 118; Pugh v. Davis, 96 U. S. 332; Freeman v. Wilson, 51 Miss. 329; Campbell v. Dearborn, 109 Mass. 130; Perkins v. West, 55 Vt. 265.

[80] Barrett v. Carter, 3 Lans. (N. Y.) 68; Baugher v. Merryman, 32 Md. 185; Sharp v. Smitherman, 85 Ill. 153; Frink v. Adams, 36 N. J. Eq. 485; Reed v. Reed, 75 Me. 264.

[81] Plummer v. Guthrie, 76 Pa. St. 441.

[82] Barrett v. Carter, 3 Lans. (N. Y.) 68.

If the conveyance is in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or a collateral paper, parol evidence to show that it was intended to secure a debt and to operate only as a mortgage must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail.[83] In considering the question whether an instrument in the form of a deed is not actually a mortgage, it is important to inquire whether the consideration was adequate to induce a sale;[84] and the presumption in favor of the conveyance will be greatly strengthened where it appears that there is no considerable disproportion between the price paid and the value of the property.[85]

The true test in the determination of questions of this character seems to be whether the conveyance was made as a security for the payment of money or the performance of any act or condition; and if the transaction resolves itself into a security it is in equity a mortgage, whatever may be its form.[86]

If an agreement for resale is made contemporaneously with the conveyance, coupled with express conditions, the transaction may be either a mortgage or a conditional sale, dependent on the intention of the parties. Usually, if there has been an extinguishment of a pre-existing debt, or where no debt existed or continued between the parties, an agreement to repurchase within a given time constitutes a conditional sale and not a mortgage.[87]

The language which the parties have seen fit to employ furnishes the best evidence, as a rule, as to the real character of the transaction; but if the language is equivocal the attending circumstances may be resorted to, and in many cases they

[83] Cadman v. Peter, 118 U. S. 73; Hyatt v. Cochran, 37 Iowa 309; Sinclair v. Walker, 38 Iowa 575; Haynes v. Swann, 6 Heisk. (Tenn.) 560; Helm v. Boyd, 124 Ill. 370.

[84] Russell v. Southard, 12 How. (U. S.) 139; Helm v. Boyd, 124 Ill. 370.

[85] Coyle v. Davis, 116 U. S. 108.

[86] Sutphen v. Cushman, 35 Ill. 186; Cooper v. Brock, 41 Mich. 488; Hooper v. Bailey, 28 Miss. 328; Slowey v. McMurray, 27 Mo. 113; Carr v. Carr, 52 N. Y. 251; Montgomery v. Spect, 55 Cal. 552; McNamara v. Culver, 22 Kan. 661; Freeman v. Wilson, 51 Miss. 329.

[87] Mitchell v. Wellman, 80 Ala. 16; Murray v. Riley, 140 Mass. 490; Johnson v. Clark, 5 Ark. 340;

will furnish the true criterion by which to judge whether it is an absolute conveyance, a conditional sale or a mortgage.[88]

§ 364. **Doctrine of relation.** The doctrine of relation is applied in conveyances of land to equitable titles which subsequently mature, either by operation of law or act of the parties, into legal titles; and where several acts concur to make a conveyance, estate or other thing, the original act will be preferred, and to this the other acts will have relation. The fiction of relation is that the intermediate *bona fide* alienee of the incipient interest may claim that the grant inures to his benefit by an *ex post facto* operation. In this way he receives the same protection at law that a court of equity could afford him. Thus, the assignee of a certificate of purchase of school land, the purchase money being all paid, conveyed the premises by quitclaim deed; a few days afterward he received the patent, and it was held that the legal title passed to his grantee. So, where a deed is made in pursuance of a recorded land contract, it relates back to the date of the contract and conveys the title as it stood at the time the contract was recorded.[89] The same doctrine also applies to grants of unlocated land, the subsequent location operating by relation to the original grant.[90] The doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice; and, where several proceedings are required to perfect a conveyance of land, it is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.[91]

§ 365. **Lost deeds.** A lost deed can only be established by clear and satisfactory proof.[92] Where the deed has been record-

Henly v. Hotaling, 41 Cal. 22; Price v. Karnes, 59 Ill. 276; Wilson v. Carpenter, 62 Ind. 495.

[88] See Pitts v. Cable, 44 Ill. 105; Cornell v. Hall, 22 Mich. 377; Rockwell v. Humphrey, 57 Wis. 414; Hughes v. Sheaff, 19 Iowa 343; Rich v. Doane, 35 Vt. 125; Logwood v. Hussey, 60 Ala. 417; Slowey v. McMurray, 27 Mo. 113.

[89] Welch v. Dutton, 79 Ill. 465; Snapp v. Pierce, 24 Ill. 156.

[90] Dequindre v. Williams, 31 Ind. 444.

[91] Gibson v. Chouteau, 13 Wall. 92.

[92] Loftin v. Loftin, 96 N. C. 94.

ed, such record or a certified copy thereof is generally the best evidence that can be procured;[93] while in case of the loss or destruction of both deed and record, an abstract of title, made in the regular course of business, has, under the aid of statutes, been frequently held to be competent proof.[94] It has also been held, in such latter event, that a copy of the original deed may be proved by the person who made the copy.[95]

§ 366. Forged deed. Any document relied upon as a muniment of title must, as a rule, be susceptible of being proved, unless it ante-dates the period of limitation, in which case, in the absence of other controlling circumstances, it may be offered under the rules relating to ancient deeds.

A forged deed, having never had a legal inception, is absolutely void.[96] It conveys no right, title or interest, nor will the recording of same affect the legal rights of the parties concerned.[97] Where the forgery is established the question of good faith is not involved,[98] and it is immaterial that a purchaser may have entered thereunder without notice of the infirmity. Yet where there has been an actual adverse possession, commenced without notice and in good faith, and such possession has continued uninterruptedly for the statutory period, such deed may be effective as an estoppel considered in connection with the statute of limitations.

[93] The record of a deed is *prima facie* evidence of the genuineness, due execution and delivery of the original. Burroughs v. De Couts, 70 Cal. 361.

[94] Heinson v. Lamb, 117 Ill. 549.

[95] Fletcher v. Horne, 75 Ga. 134.

[96] Haight v. Vallet, 89 Cal. 245; Meley v. Collins, 41 Cal. 663.

[97] Haight v. Vallet, 89 Cal. 245; Pry v. Pry, 109 Ill. 466.

[98] McGinn v. Tobey, 62 Mich. 252.

CHAPTER XIV.

THE LAND CONVEYED.

§ 367. General principles.
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§ 367. General principles. The object of a description in a deed is to define what the parties intend, the one to convey and the other to receive, by such deed; and the intention of the parties is to be deduced from the instrument of conveyance, as in the case of any other contract.[1] The true location of the premises may be ascertained from the references of the deed—the monuments, points and lines expressly called for, which are fixed and well known, or are capable of being fixed with certainty, the courses and distances, and the whole description generally; while evidence extrinsic from the deed is admissible under certain circumstances, and may be employed.[2]

[1] Long v. Wagoner, 47 Mo. 178; Kimball v. Semple, 25 Cal. 440.

[2] Fuller v. Carr, 33 N. J. L. 157; Kronenberger v. Hoffner, 44 Mo. 185; Jackson v. Barringer, 15 Johns. (N. Y.) 471; Child v. Ficket, 4 Me. 471; Green v. Jordan, 83 Ala. 220.

A grant must describe the land to be conveyed, and the subject granted must be identified by the description given of it in the instrument itself; if the land be so inaccurately described as to render its identity wholly uncertain, the grant is void.[3] Where deeds or other writings are referred to as parts of the description in a deed, they may be used in evidence in aid of the description;[4] and in like manner, where a map or plat is referred to, the effect is the same as if it were copied into the deed.[5]

A grant of land will not be held void for uncertainty of description if, in the nature of things, it seems possible to obtain testimony by means of which the particular parcel granted may be determined;[6] and where the different parts of a description are repugnant and contradictory to each other, such parts may be rejected and such retained as will leave enough to designate plainly and clearly the land intended to be conveyed.[7] Where the parties, by their subsequent acts, have given a practical construction to a deed having in some particulars a false or indefinite description, such practical construction by the parties themselves will be considered by courts in construing a doubtful clause.[8]

The location of land as gathered from the description is governed (1) by natural objects or boundaries, such as rivers, lakes, creeks, mountains, etc.; (2) by artificial monuments, such as marked trees, lines, stakes, etc.; and (3) by course and

[3] Boardman v. Reed, 6 Pet. (U. S.) 328; Campbell v. Johnson, 44 Mo. 247; Dull v. Blum, 68 Tex. 299; Williams v. R. R. Co. 50 Wis. 71; People v. Klumpke, 41 Cal. 263.

[4] Cleveland v. Simms, 69 Tex. 153; Powers v. Jackson, 50 Cal. 429; Waterman v. Andrews, 14 R. I. 589.

[5] Noonan v. Braley, 2 Black (U. S.), 499; Burbach v. Schweinler, 56 Wis. 386; Penry v. Richards, 52 Cal. 496.

[6] Blake v. Doherty, 5 Wheat. (U. S.) 359; Harkey v. Cain, 69 Tex. 146; Nixon v. Porter, 34 Miss. 697; Pursley v. Hayes, 22 Iowa 11.

[7] Jackson v. Sprague, 1 Paine (C. Ct.), 494; Murry v. Hobson, 10 Colo. 66; Deal v. Cooper, 94 Mo. 62; Wade v. Deray, 50 Cal. 376; White v. Gay, 9 N. H. 126.

[8] Hamm v. San Francisco, 17 Fed. Rep. 119; Lovejoy v. Lovett, 124 Mass. 270; Simpson v. Blaisdell, 85 Me. 199. The rule of interpretation which rejects erroneous particulars of description, where what is left sufficiently identifies the subject of the grant, is adopted in aid of the intention of the grantor as gathered from the instrument itself, read in the light of the circumstances in which it was written; and does not apply where the description of the land

distance.[9] The true location of land is ascertained by the application of all or any of these rules to the particular case. And when they lead to contrary results or confusion, that rule must be adopted which is most consistent with the intention apparent upon the face of the deed, read in the light of the surrounding facts and circumstances.[10] It is a general rule of construction that monuments control courses and distances, and estimates of quantity are usually subordinated to both.[11] The rule that fixed monuments, whether natural or artificial, should usually be given preponderating weight and preferred to course and distance is obviously reasonable, as they are less liable to error,[12] while variance between actual and estimated quantity is not usually a material circumstance; and when the quantity is mentioned in addition to a description of the boundaries, or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the definitely determined boundaries or lot-number if they do not agree.[13]

The calls of a deed, whether natural or artificial, are further divided into two classes, one termed descriptive or directory, and the other special and locative. The former, though consisting of rivers, lakes, etc., must yield to the special locative calls, for the reason that the latter, consisting of the particular objects upon the lines or corners of the land, are intended to indicate the precise boundary of the land, about which the locator and surveyor should be, and are presumed to be, very exact. On the other hand, the former are generally called for without any care for exactness, and are intended merely

in the deed which it is sought to reject is an accurate description of the land intended by the parties to be conveyed. Prentice v. Stearns, 113 U. S. 435.

[9] Stafford v. King, 30 Tex. 257; Crampton v. Prince, 83 Ala. 246; Adair v. White, 85 Cal. 314.

[10] Stafford v. King, 30 Tex. 257; Truett v. Adams, 66 Cal. 218; Lyman v. Loomis, 5 N. H. 408; Smith v. Dean, 15 Neb. 432,

[11] Baldwin v. Brown, 17 N. Y. 359; Watson v. Jones, 85 Pa. St. 117; Davis v. Rainsford, 17 Mass. 207.

[12] Crampton v. Prince, 83 Ala. 246.

[13] Jackson v. Moore, 6 Cow. (N. Y.) 705; Ware v. Johnson, 66 Mo. 662; Belden v. Seymour, 8 Conn. 19; Dalton v. Rust, 22 Tex. 133; Clark v. Scammon, 62 Me. 47; Doyle v. Mellon, 15 R. I. 523,

to point out or lead a person into the region or neighborhood of the tract, and hence not considered as entitled to much credit in locating the particular boundaries of the land. When they come in conflict with special locative calls, they must give way to them.[14]

§ 368. **Ambiguous descriptions.** The object of the law in permitting a construction of a deed is to ascertain and discover the intention of the parties, so that the same, if possible, may have effect. To this end all the references to location and description of the land intended to be conveyed are required to be considered in order to arrive at the true meaning and intention of the instrument; and where ambiguity can only be dispelled by the rejection or substitution of words or phrases, such words may be rejected or supplied by intendment in order to give effect to the intention.[15]

A deed will not be ambiguous simply because it does not show on its face the limits or quantity of the land granted, provided it refers to certain well-known objects by which such limits may be readily ascertained.[16]

The general rule is that a deed must be upheld if possible, and the terms and phraseology of description will be inter-

[14] Wright v. Mabry, 9 Yerg. (Tenn.) 55; Stafford v. King, 30 Tex. 257.

[15] Hathaway v. Power, 6 Hill (N. Y.), 453. A call in a deed for a block of a certain number may be rejected and another block substituted where the error is apparent from the whole description. Murray v. Hobson, 10 Colo. 66. So, too, where a call in a deed read "east with," etc., and it was manifest that this meant "east parallel with," etc., *held*, that the missing word should be supplied by construction. Deal v. Cooper, 94 Mo. 62. And see Edwards v. Bowden, 99 N. C. 80; White v. Gay, 9 N. H. 126; Thatcher v. Howland, 2 Met. (Mass.) 41; Reamer v. Nesmith, 34 Cal. 624; Chandler v. Green, 69 Me. 350; Meyers v. Ladd, 26 Ill. 415.

[16] Simmons v. Jordan, 14 Wis. 523; and see Coats v. Taft, 12 Wis. 388, where a deed described the land conveyed as a part of the east half of the southwest quarter of section 5, township 3, range 8, beginning on the south line of said section 5, on the east side of the bottom land of the creek, *far enough up the bank to raise a nine-foot head to a mill* standing by the bridge on section 8; thence up the bottom land one hundred rods, to include all the bottom land on both sides of the creek, within the above-mentioned bounds. *Held*, that the deed conveyed the bottom lands that would be flowed by such nine-foot head, on each side of the creek, for the distance of one hundred rods, in a direct line from the place of beginning, up the creek,

preted to that end if this can reasonably be done consistently with the principles and rules of law.[17] In the furtherance of this rule courts are ever inclined to exercise a wide latitude in construing descriptions, and for the purpose of sustaining a grant will receive extrinsic evidence to identify and establish the object of the call in a deed; and in all cases where an apparent uncertainty is created, but which may be removed by judicious construction and resort to parol proof, such proof may be resorted to.[18]

§ 369. **Inconsistent descriptions.** Following the rule that a deed is to be construed according to the intention of the parties as manifested by the entire instrument, although such construction may not comport with the language of a particular part of it,[19] it has been held that, where a deed contains two descriptions equally explicit and unambiguous, but inconsistent with each other, that description must control which best expresses the intention of the parties as manifested by the whole instrument, due regard being had to the attendant facts and circumstances.[20] This difficulty occurs most frequently where, in the anxiety of the draughtsman to insure

to a point where the water would be flowed, on the same side of the creek, by the nine-foot head of water at the mill referred to. And see Nixon v. Parker, 34 Miss. 697; Pursley v. Hayes, 22 Iowa, 11; Dorr v. School District, 40 Ark. 237.

[17] Edwards v. Bowden, 99 N. C. 80.

[18] As, where the description in a deed is perfect but there is a mistake as to its geographical position, the location of the property geographically may be rejected as surplusage, and parol evidence received to identify the property described in the deed. Myers v. Ladd, 26 Ill. 415. So, also, where lands are accurately and minutely described by metes and bounds, courses and distances, and other *indicia* of location, as the ownership of adjoining lands, etc., but a mistake is made in the quarter section. Thompson v. Jones, 4 Wis. 106. A deed described the land thereby conveyed as being in "Linghton," in the county of Addison. *Held*, that the name "Linghton" was so like the name "Lincoln," a town in said county, and so unlike the name of any other town in the county, that the deed was properly admitted in evidence, in connection with other evidence showing the situation and circumstances at the time, as tending to show that the *locus in quo* was the land conveyed by the deed. Armstrong v. Colby, 47 Vt. 360.

[19] Allen v. Holton, 20 Pick. (Mass.) 458; White v. Gay, 9 N. H. 126; Richardson v. Palmer, 38 N. H. 212.

[20] Driscoll v. Green, 49 N. H. 101; Wade v. Deray, 50 Cal. 376; Benedict v. Gaylord, 11 Conn. 332.

absolute accuracy, one description is, as it were, superadded to the other, and one description being complete and sufficient in itself, while the other, which is subordinate or superadded, is incorrect. In such event the incorrect description, or feature or circumstance of the description, may be rejected as surplusage, and the complete and correct description allowed to stand alone.[21]

Words of general description, if inconsistent with the description by metes and bounds, should be rejected;[22] and, generally, whenever several particulars are mentioned, those found erroneous may be disregarded, and the unambiguous and correct may be relied on to determine the rights of the parties.[23]

Course and distance, while furnishing in most instances reliable data from which to ascertain the exact dimensions of the land granted, must nevertheless be set aside where from other parts of the description or from descriptions superadded a clearly different intent is manifested,[24] or where the calls of the courses will not close.[25]

§ 370. General and special description. In the construction of a written instrument it is an established rule that a particular specification will exclude things not specified, and control matters alluded to only in general terms. This rule may be applied to the description of the property conveyed as well as to other provisions of the deed; and where lands are

[21] Doane v. Wilcutt, 82 Mass. 368; Kruse v. Wilson, 79 Ill. 233; Driscoll v. Green, 59 N. H. 101; Raymond v. Coffey, 5 Oreg. 132.

[22] Raymond v. Coffey, 5 Oreg. 132; Benedict v. Gaylord, 11 Conn. 332.

[23] Doane v. Wilcutt, 82 Mass. 368. So where one of the calls in the description was "thence northwesterly along Moss street," etc., which, taken in connection with other calls, was senseless and unmeaning, but which, by the omission of the word "northwesterly" and adapting the line to Moss street, answered the call and made a complete description *held*, that the word "northwesterly" should be rejected as surplusage. Kruse v. Wilson, 79 Ill. 233.

[24] Hampton v. Helms, 81 Mo. 631.

[25] A deed conveying land by courses and distances also described it as "one hundred and ninety-seven acres, being the south end of a tract surveyed by virtue of a warrant in the name of H. M., being the remaining part of said tract hitherto unsold." The H. M. tract contained originally four hundred and forty-seven acres, and two hundred and fifty acres had been sold; but the courses and distances did not correspond to the marks on the ground, and would

first described, generally, and afterwards a particular description is added, the latter will restrain and limit the general description.[26]

Ordinarily a general description, unequivocal in terms and capable of exact identification, will be effectual for the purpose of conveying all the land to which it applies;[27] yet in construing a deed the real intent is to be gathered from the whole description, particular as well as general, and where there is obscurity or uncertainty all of the particulars in the description are to be taken into account. In a case of this kind the particulars describing the location of the land, the quantity, its commonly-known designation, or other similar incidents, are as much a part of the description of the subject of the conveyance as the designation by lot-number or platted title.[28] Where the particulars unmistakably show the general description to be false, such general description, or so much of it as is clearly repugnant to the grant, may be rejected, and, under the familiar rule that where the description is ambiguous, or there is inconsistency in the several particulars, words, if necessary, may be supplied by intendment, and particular clauses and provisions qualified and transposed, while such words as may reasonably appear to have been omitted by inadvertence may be introduced.[29] Thus, where

not close unless several changes were made. *Held*, that the descriptive phrase "the south end," etc., governed. Duncan v. Madara, 106 Pa. St. 562.

[26] Thorndike v. Richards, 13 Me. 430; Barney v. Miller, 12 Iowa, 460; Case v. Dexter, 106 N. Y. 548; Doe v. Porter, 3 Ark. 18; Smith v. Strong, 14 Pick. (Mass.) 128; Sikes v. Shows, 74 Ala. 382; Gano v. Aldridge, 27 Ind. 294; Bell v. Sawyer, 32 N. H. 72; and see Bolt v. Burnell, 11 Mass. 167; Bates v. Foster, 59 Me. 157; Bent v. Rogers, 137 Mass. 192; Chapman v. Crooks, 41 Mich. 595.

[27] Stanley v. Green, 12 Cal. 148; Bower v. Earl, 18 Mich. 367; Foss v. Crisp, 20 Pick. (Mass.) 121; Jackson v. McConnell, 19 Wend. (N. Y.) 175.

[28] Case v. Dexter, 106 N. Y. 548; and see Ousby v. Jones, 73 N. Y. 621.

[29] Murray v. Hobson, 10 Colo. 66; Deal v. Cooper, 94 Mo. 62; Case v. Dexter, 106 N. Y. 548; Edwards v. Bowden, 99 N. C. 80. A grantor conveyed a large number of lots of land, described as lying in a tract of wild land, called the *Boston Purchase*. Among these lots were two described as long lots, numbered 15 and 43, containing one hundred and forty acres each, more or less, which were originally included in the surveys of the Boston Purchase, but which it had been ascertained previously to the

a general description which describes a tract of land by its platted number is followed by specification of quantity and geographical location, all describing a much smaller area, and showing such general description to be mistaken or false, it is fair to suppose that the words "part of" or words of similar import were inadvertently omitted from such general description. It is true that a variance between the actual and estimated quantity of land is not usually a material circumstance, yet in some cases it may become an important element in determining the intention of the parties to the grant; and, where the estimate of quantity in the particulars and the actual area of the land covered by the general description is grossly disproportionate, the statement of quantity becomes very significant.

So, too, natural monuments, as water-ways, or other physical landmarks, will have a preponderating weight in determining questions of this kind and in ascertaining the amount of land actually embraced in the whole description. Nor would this be a case of cutting down an interest or estate once clearly given by subsequent indefinite or ambiguous language; for all of the several items in a deed of this character are to be regarded as but parts of one single description, and the sole question is, What land is embraced therein?

Neither is a particular description in a deed necessarily enlarged by a succeeding general description by way of reference to and adoption of the description of a former conveyance; and this rule has been held to apply even where the language is that the grantor "intended to convey the same and identical land conveyed by said" former deed.[30] While the intent of the parties, so far as such intent can be collected from the whole instrument, must receive effect if possible, yet under the established rules of construction applying to conveyances of real property, nothing will pass by a deed

date of the deed, were adjoining thereto. *Held*, that the words of the deed were sufficient to pass the two long lots, for the words of general description are controlled by the particular description. Smith v. Strong, 14 Pick. (Mass.) 128.

[30] Brunswick Savings Inst. v. Crossman, 76 Me. 577; Thayer v. Finton, 108 N. Y. 394; Green Bay Canal Co. v. Hewett, 55 Wis. 96; Clement v. Bank, 61 Vt. 298; but see Plummer v. Gould, 92 Mich. 1.

except what is described therein, whatever the intention of the parties may have been.[31] Hence, when a deed contains an accurate description by permanent boundaries capable of being ascertained, a general reference to the premises, in addition, as that the land is then in the possession of the grantor or grantee, or referring to descriptions in former deeds, or a designation by name or locality, will not have the effect to enlarge the grant or pass title to lands outside of the boundaries given.[32] Where it is not disputed that the boundaries as given in the particular description are definite, unambiguous and certain, and describe a known and definite parcel, the addition of a general statement of quantity is immaterial; and but little weight can be ascribed to such statement when followed by the words "more or less." According to settled rules, such statement cannot be held to affect the quantity of land included within specified boundaries when they are clearly and certainly ascertainable. Nor will the fact that the land described may have been in the possession of the grantor, or was conveyed to him by a particular conveyance, as stated in the general description, alter the case; for while it may be said that it does not cover all the land so possessed by or conveyed to him, it is a sufficient answer to say that the deed does not profess to, but simply attempts to, give additional particulars as to the property actually described, and which, as far as they are given, are correctly stated.

In such a case, by confining the grant to the land included within the boundaries, meaning and effect is given to all the language of the deed except possibly that relating to quantity, which is comparatively immaterial; and the absurdity is avoided of supposing that parties intended to convey distinct and separate tracts of land outside of the boundaries given by using inconclusive and general language following a particular description. Where by the express language of the descrip-

[31] Coleman v. Manhattan Beach Co. 94 N. Y. 229.

[32] Jones v. Smith, 73 N. Y. 205. Thus, where a deed of land, after describing it by metes and bounds, contained the words "or however otherwise the same is bounded or reputed to be bounded, being the mansion and land thereto belonging," it was held that this general clause did not enlarge the grant, although alone it would have carried the mansion-house and land. Tyler v. Hammond, 11 Pick. (Mass.) 193.

tion the parties have set visible and known limits to the land intended to be conveyed, it is not the province of construction to enlarge this description and embrace within it other lands not mentioned.[33]

§ 371. **Specific parts.** Land is often described as a specific part of a larger and more minutely-described tract; and where no inconsistency is manifest in such description, and such specific part can with accuracy be identified and segregated from such larger part, the description will be effectual to convey the land actually embraced within the ascertained boundaries of such parcel. In descriptions of land which refer to the government surveys such description by specific parts is perhaps as accurate as any that could possibly be employed, as all section lines are based on true meridians and standard parallels of latitude, with accurate measurements of areas. The Federal government in parting with title makes use of the terms "half" and "quarter" in describing the lands conveyed, without further description by metes and bounds; and these terms continue to be employed in subsequent transfers as being the best that can be employed to denote clearness in description and accuracy in measurement.

When used to denote the legal subdivisions of the government surveys the employment of the words "half" and "quarter" can produce no ambiguity or uncertainty; and generally, where the tract out of which the specific part is to be taken has a well-defined boundary, no inconvenience or uncertainty should result from the use of any term expressing geometrical proportion.

The word "half," when used in describing land, should be construed as meaning "half" in quantity, or a division into equal areas,[34] unless the context or surrounding facts and circumstances show a contrary intention.[35] But where this

[33] Thayer v. Finton, 108 N. Y. 394. In this case the grantor owned an eighty-eight acre farm and a nine-acre wood-lot adjoining the farm. His deed definitely described the boundaries of the farm, and then added, "containing ninety-five acres, more or less, being the same premises" conveyed by C. to the grantor. The wood-lot had been conveyed to the grantor by C. as well as the farm. *Held*, that the wood-lot did not pass by the deed.

[34] Hartford, etc. Co. v. Cambria Co. 80 Mich. 491.

[35] Jones v. Pashby, 62 Mich. 614; Owen v. Henderson, 16 Wash. 39. In this case the vendor sold the

method of designation is used, followed by a particular description, the latter will restrain and limit the general description. So, also, a subsequent deed of a specific part of a larger tract from which parcels have been sold by particular descriptions should be construed with reference to the particular descriptions in such former deeds.[36]

Probably the greatest amount of difficulty is experienced in sales of land by acreage where the description is rendered uncertain by indefinite location. As, where the land is described as the "South part" of a specified tract containing a definite number of acres. As a rule, however, courts will endeavor to reconcile any inconsistencies that may appear as well as supply deficiencies, and where a boundary can be supplied in apparent conformity to the intention of the parties this may be done.[37]

A grant of a specific but unlocated part of a larger tract will not for that reason be held void for uncertainty, provided a right of election is given and a subsequent location made under and in pursuance of such right.[38] It would seem, however, that a deed purporting to describe a specific tract or parcel of land, giving the number of acres and calling it part

west half of a fractional lot, a part of the lot being cut off by a bay, and the court held the purchaser entitled to an equal half of the lot in area and not the part lying west of a line drawn north and south midway and parallel to the side lines of the lot.

[36] As where the owner of a triangular lot conveyed what he called the "north half" of it, following this designation by a particular description, and then subsequently conveyed the "south half" of the lot. Grandy v. Casey, 93 Mo. 595.

[37] Thus, a description calling for the "south part of Sec. 5, 3, 14, R. 4 east, two hundred and twenty-five acres," was held not void for uncertainty, but the lands would be located by laying off 225 acres having the south, east and west sides of the section for boundaries, with the remaining boundary a line parallel to the south line of the section and sufficiently distant therefrom to include the requisite quantity. See Tierny v. Brown, 65 Miss. 163.

[38] Where a deed granted six hundred acres of land to be surveyed or taken off a large tract, and by the terms of an instrument referred to in the deed the tracts were to be divided into lots of one hundred acres each, and an election of lots was given to the grantees, which they subsequently made, it was held that though by the terms of the deed the premises granted were undefined and uncertain, still that the subsequent location, in pursuance of the right of election given by the deed, rendered that certain and definite

of a larger tract, but which fails to describe the tract intended to be conveyed or any tract, does not convey an undivided interest in the larger tract, nor make the grantee tenant in common with the grantor in the latter.[39]

§ 372. **Identification after conveyance.** The law permits parties to give a practical construction to their deeds and conveyances by subsequent acts, and it has been held that when a parcel is not identified by the instrument of conveyance, or so imperfectly designated that without other evidence it would be void for ambiguity, the parties may afterwards survey or mark out the land intended to be conveyed, and if possession is taken of such part this will serve to ascertain the grant and give effect to the deed.[40]

§ 373. **Extrinsic evidence.** Without in any way impeaching the general proposition that extrinsic evidence can never be received to contradict, vary or control a written instrument and more particularly an instrument of so much solemnity as a deed, it may nevertheless be stated that whenever, for any cause outside of a deed, there arises a doubt in the application of the descriptive part thereof, evidence *dehors* the writing may be resorted to for the purpose of identifying the subject of the instrument and the understanding or intent in this respect of the parties thereto. The difficulty in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way.[41] Hence, the acts and admissions of the parties, showing a construction given by themselves, may, and, from the necessities of the case, must, often be shown where a deed is indefinite, uncertain or ambiguous in the description of the location, area or boundaries of the land conveyed.[42] So, also, where the description in a deed appears to be true in part and false in part, and it can be ascertained from references in the

which was before uncertain, and vested a legal title in the specific parts elected to be taken by the grantees. Corbin v. Jackson, 14 Wend. (N. Y.) 619.

[39] Grogan v. Vache, 45 Cal. 610.

[40] Simpson v. Blaisdell, 85 Me. 199; Herrick v. Morrill, 37 Minn. 250; and see Armstrong v. Mudd, 10 B. Mon. (Ky.) 144.

[41] Grogan v. Vache, 45 Cal. 610.

[42] Reed v. Proprietors of Locks, 8 How. (U. S.) 274; Deery v. Cray, 10 Wall. (U. S.) 263; Fuller v.

deed to other contemporary documents and extrinsic attending facts which part is false, so much of the description as is false must be rejected; and the practical construction given by the parties themselves will be considered in construing the doubtful clause.[43] In other words, where the intent of the parties is doubtful on the face of the deed it may be construed and interpreted in the light of attendant extrinsic facts and surrounding circumstances.[44]

But where the description is complete in itself the rule first mentioned applies, and the description cannot be controlled by the declarations of the parties, or by proof of negotiations or agreements on which the deed was executed;[45] nor will parol evidence of any kind be received to establish a different location or another designation.[46]

§ 374. Construction by the parties. As has been stated, where the parties to a deed have by their subsequent acts given a practical construction to an indefinite or doubtful description in a deed, courts will usually adopt the construction so given;[47] but where the language of the deed admits of only one construction, and the location of the premises intended to be conveyed is clearly ascertained by a sufficient description by courses, distances or monuments, it cannot be controlled by any different exposition derived from the acts of the parties. The rule is applicable only where the language is equivocal and the location is made doubtful, either by the insufficiency of the description or the inconsistency of two or more parts of the description. In such latter event the construction put upon the deed by the parties in locating the

Carr, 33 N. J. L. 157; Clark v. Powers, 45 Ill. 283; Lovejoy v. Lovett, 124 Mass. 270; Lanman v. Crooker, 97 Ind. 163.

[43] Hamm v. San Francisco, 17 Fed. Rep. 119; Homestead Ass'n v. Lawnsdale, 19 Fed. Rep. 291; Truett v. Adams, 66 Cal. 618.

[44] Bortz v. Bortz, 48 Pa. St. 382; Herman v. Roberts, 119 N. Y. 37; Herrick v. Morrill, 37 Minn. 250; French v. Hayes, 43 N. H. 30.

[45] Parker v. Kane, 22 How. (U. S.) 1; Benedict v. Gaylord, 11 Conn. 332.

[46] Jennings v. Brizeadine, 44 Mo. 332; Fratt v. Woodward, 32 Cal. 219.

[47] Hamm v. San Francisco, 17 Fed. Rep. 119; Deery v. Cray, 10 Wall. (U. S.) 263; Fuller v. Carr, 33 N. J. L. 157; Stone v. Clark, 1 Met. (Mass.) 378; Lovejoy v. Lovett, 124 Mass. 270; Truett v. Adams, 66 Cal. 618.

premises may be resorted to as an aid in ascertaining their intention.[48]

§ 375. **Reference to plat.** In the construction of a deed of conveyance, where the land conveyed is described by reference to a certain map or plan, the courses, distances and other particulars appearing on such plat are to be as much regarded as the true description of the land conveyed as they would be if expressly recited in the deed.[49] By reference the plat becomes in fact a part of the deed, as much so as if it had been copied therein,[50] and the purchaser will be restricted to the boundaries as shown thereby.[51] On the other hand, he will have a right to claim the entire area shown thereby and the boundaries delineated on the plat will overcome figures of dimension whenever such figures fail to coincide with the monuments.[52]

If a purchase is made of a specific lot or block according to a plat, and a further description by metes and bounds or courses and distances is added, such latter description will be subordinate to the description of the land by its block number, and in case of conflict the former will prevail.[53]

Words of reference to a plat employed in a deed are usually,

[48] Jackson v. Perrine, 35 N. J. L. 137; Bond v. Fay, 12 Allen (Mass.) 86; Lovejoy v. Lovett, 124 Mass. 270; Simpson v. Blaisdell, 85 Me. 199; Herrick v. Morrill, 37 Minn. 250.

[49] Davis v. Rainsford, 17 Mass. 207; Magoun v. Lapham, 21 Pick. (Mass.) 135; Piper v. Connelly, 108 Ill. 646; Burbach v. Schweinler, 56 Wis. 386; Davidson v. Arledge, 88 N. C. 326.

[50] Piper v. Connelly, 108 Ill. 646; Hudson v. Irwin, 50 Cal. 450.

[51] McCormick v. Huse, 78 Ill. 363; Davidson v. Arledge, 88 N. C. 326.

[52] Where a man conveyed a town lot according to a certain plat, which represented the lot as bounded on the north by a street, and on the south by a stream, and its east and west lines as extending from the street to the stream, and upon which were figures purporting to give the length of these lines, but in fact the distance from the street to the stream was greater than the length of these lines as thus indicated, the plat became a part of the deed for the purposes of the description and identification of the land; and under the rule that distances must yield to monuments or natural boundaries called for in a deed, the conveyance of the lot according to the plat included all the land between the street and the stream. Nicolin v. Schneiderhan, 37 Minn. 63.

[53] Masterson v. Munro, 105 Cal. 431.

if not always, words of description only and not of quality. They serve to connect the deed with the plat, so that by applying the one to the other the former may be rendered intelligible; but while they give effect to the expressions of the deed they do not limit them.[54]

§ 376. **Survey governs plat.** The remarks and conclusions of the foregoing paragraph are made upon the presumption that the plat truly represents the survey. The marks and lines on the ground constitute the actual survey of land, while the draft or projection is merely evidence of such survey;[55] and where any question arises with regard to the plat or the actual location of the lots as parceled by the survey, the marks, stakes and monuments upon the land, according to which purchasers have bought and taken possession, will control and govern the plat.[56] The actual survey rather than the plan fixes the location and boundaries of the lot.[57] Hence, purchasers of town lots have the right to locate their lot lines according to the stakes set by the platter or subdivider of the lands, and no subsequent survey can, it seems, be introduced to unsettle such lines. The question afterwards is, not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting had been done with absolute accuracy, but whether they were placed by authority and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them.[58]

In cases of deficiency or excess a rule has been formulated in some states which, to a certain extent, may seem to militate against that last stated. Thus, if the lines of a survey are found to be either shorter or longer than stated in the

[54] Alton v. Illinois Trans. Co. 12 Ill. 88.

[55] Riddlesburg, etc. Coal Co. v. Rogers, 65 Pa. St. 416; Bean v. Bachelder, 78 Me. 184.

[56] The rule applied to a case where the evidence did not show that a lot interpolated upon a plat had ever been sold by the proprietors, or that any one had ever taken actual possession of any specific part of the land as and for that lot. Marsh v. Mitchell, 25 Wis. 706.

[57] Bean v. Bachelder, 78 Me. 184.

[58] Heaton v. Hodges, 14 Me. 66; Mills v. Penny, 74 Iowa 172; Johnson v. Archibald, 78 Tex. 96; Flynn v. Glenny, 51 Mich. 580.

plat or field notes, the causes contributing to such mistake will be presumed to have operated equally in all parts of the original survey, and every lot or parcel must bear the burden or receive the benefit of a corrected survey, in the proportion which their respective frontages, as stated in the original plat or field notes, bears to the whole frontage as there set forth.[59]

§ 377. **Identification of boundary lines.** The primary rule in the construction of descriptions in conveyances of lands is that whenever fixed and known monuments as well as courses and distances are given to describe the same line, and there is a discrepancy between the two, the monuments so called for must prevail over the courses and distances,[60] upon the theory that it is more likely that there would be a mistake or a misunderstanding about the course or the distance than about the monument.[61] This theory proceeds on the assumption that in all cases of division or subdivision there has been an actual survey and the reason of the rule is therefore apparent. So, also, it has been held that points and lines expressly called for, which are fixed and well known, or are capable of being fixed with certainty, should govern and control the courses and distances;[62] and further, that where there are no express calls that determine a line with certainty, evidence *aliunde* is admissible to show where the line was actually run to which the deed alludes or to which it must have reference; and its location so fixed by extrinsic evidence will control the courses and distances named in the deed.[63]

[59] Pereles v. Magoon, 78 Wis. 27; James v. Drew, 68 Miss. 518.

[60] Kronenberger v. Hoffner, 44 Mo. 185; Keenan v. Cavanaugh, 44 Vt. 268; Welder v. Hunt, 34 Tex. 44; West v. Shaw, 67 N. C. 489; Barclay v. Howell, 6 Pet. (U. S.) 498; Morrow v. Whitney, 95 U. S. 551. Thus, if marked trees or corners be found conformably to the calls of a deed, or if other natural objects be called for, distance must be lengthened or shortened and courses varied so as to conform to those objects. McIver v. Walker, 9 Cranch (U. S.) 173.

[61] Keenan v. Cavanaugh, 44 Vt. 268. As a general rule, in the location of lands described in a deed, natural objects called for therein —such as mountains, lakes, rivers, rocks and the like—control artificial objects, such as marked lines, marked trees, stakes, etc. Ayers v. Watson, 113 U. S. 594.

[62] Kronenberger v. Hoffner, 44 Mo. 185; Howell v. Merrill, 30 Mich. 283; Hoar v. Goulding, 116 Mass. 132; Ayers v. Watson, 113 U. S. 594. Compare Kellogg v. Mullen, 45 Mo. 571; Walsh v. Hill, 38 Cal. 481.

[63] Kronenberger v. Hoffner, 44 Mo. 185; Hoar v. Goulding, 116

If no monuments are mentioned in a deed, or if mentioned their existence and location are not proved, courses and distances will govern;[64] and so in respect to lines, for it is only when lines called for in a deed are actually marked and can be identified that they control calls for course and distance; and when the lines called for are of doubtful identity, course and distance should be resorted to as furnishing the best evidence the case is susceptible of.[65] But while the rule is undoubted that monuments, natural or artificial, rather than courses and distances, control in the construction of a deed of conveyance, such rule will not be enforced when the instrument would be thereby defeated, and when the rejection of a call or monument would reconcile other parts of the description, and leave enough to identify the land.[66] Such rule, when applied as a rule of construction, must be considered as qualified by the further rule that the entire description must be read, and, if there are words of qualification or explanation, they must be considered in order to arrive at the intention of the parties.[67]

In all disputes respecting boundaries of governmental divisions the lines established by the original survey must be followed, even though made on a wrong magnetic variation, and it is only when lost lines and corners are to be restored that allowance can be made for variation from the true meridian.[68]

It is often stated, as a general proposition, that course controls distance, yet there is no universal rule that obliges us to prefer one to the other; and when natural and ascertained objects are wanting, and the course and distance cannot be reconciled, one or the other may be preferred according to circumstances.[69]

Mass. 132; Deery v. Cray, 10 Wall. (U. S.) 263. Compare Putnam v. Bond, 100 Mass. 58.

[64] Bagley v. Morrill, 46 Vt. 94. As where a grant is made which describes the land by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only ones given and must be used. Chinoweth v. Haskell, 3 Pet. (U. S.) 92.

[65] Browning v. Atkinson, 37 Tex. 633.

[66] White v. Luning, 93 U. S. 515.

[67] Higginbotham v. Stoddard, 16 N. Y. Sup. Ct. 1.

[68] Taylor v. Fomby, 116 Ala. 621.

[69] Preston v. Bowmar, 6 Wheat. (U. S). 580.

If the starting-point of the boundary line cannot be identified from the description given in the deed the conveyance is void.[70]

Where lands are described as being bounded on any side by the land of a third person, the land conveyed will be bounded by the true boundary line between it and the land of such third person, and not by the line that was understood or supposed to exist when the deed was given, if the two lines are not the same;[71] and a conveyance by a boundary, on a specified course and distance, "more or less," from a given point to lands of a third person named, will be governed by the true line of such lands, and not by the specified distance.[72]

Where the cardinal points of the compass are mentioned they must be understood and construed in their true technical meaning. Custom and usage in all parts of the country have to a certain extent sanctioned the employment of the terms "Northerly," "Westerly," etc., in the description of lines and courses. For this practice, however, there is no precedent in law and where such terms are used they must be construed to mean due North or West, as the case may be.[73] So, too, where the words "North-easterly," or similar expressions are employed, such words must be construed with reference to the true meridian and held to mean North-east, etc. Where a course is desired which deflects from any of the cardinal points its inclination should be ascertained and properly expressed, as, "North, ten degrees East," if the course is intended to be relied on as a guide for fixing the boundaries of the tract. The mention of cardinal points may, however, be controlled or qualified by other words of description used in connection with them and such will generally be the case when it is necessary to harmonize a line run on such course with the points given for the beginning and ending of such line.[74]

§ 378. **Marked lines.** Courts have ever been inclined to regard with favor the lines actually run in all cases of surveys,

[70] Le Franc v. Richmond, 5 Sawyer (C. Ct.) 601.

[71] Umbarger v. Chaboya, 49 Cal. 256.

[72] Howell v. Merrill, 30 Mich. 283.

[73] Brandt v. Ogden, 1 Johns. (N. Y.) 156; Fratt v. Woodward, 32 Cal. 220.

[74] Currier v. Nelson, 96 Cal. 505.

and to permit such lines, when ascertained, to control other descriptions.[75] So, where it can be proved that a line was actually run and marked and a corner made, such line will be taken as the true one, although the deed calls for a natural object not reached by such line.[76]

But while marked lines are usually permitted to control less definite means of location, it is only when the line can be identified on the ground as the one made by the surveyor that it will control a call for course and distance.[77]

§ 379. **Boundary by "parallel lines."** No term is more commonly employed in the calls of a deed than that which describes a course as running "parallel" to some other line used as a boundary. Parallel lines, by strict mathematical definitions, are usually to be regarded as straight lines, and in the employment of such terms in deeds and other instruments straight lines are usually contemplated. But in common speech about boundaries, or in a geographical sense, the words are often used to represent lines which are not straight. The term is used for want of a better, and not because it in all respects fits the use to which it is applied. It is used in many instances to avoid excessive verbiage; and while such use may not be technically exact it is not obscure, and usually there is no difficulty in understanding what is meant.[78]

If a boundary line is described in a deed as being parallel with the general course of a stream which does not run straight, but meanders, a line is meant which runs parallel with the stream in all its meanderings; and notwithstanding that a call for direction is given as "running easterly parallel

[75] Where a deed described the line in dispute as running from a corner on a given course a given number of rods to a corner, but did not state whether the corners were marked on the land or not, and it appeared by parol that they were in fact marked by means of monuments, and that there was a straight line of marked trees from one corner to the other, *held*, that the authentic line would be a straight line from one corner to the other, notwithstanding it did not conform to the course and distance given in the deed; and that the fact of the existence of said line of marked trees was legitimate as tending to show the marked corners as called for by the deed. Clary v. McGlynn, 46 Vt. 347.

[76] Baxter v. Wilson, 95 N. C. 137.

[77] Fagan v. Stoner, 67 Tex. 286.

[78] See Fratt v. Woodward, 32 Cal. 219; Williams v. Jackson, 5 Johns. (N. Y.) 306; Winthrop v. Curtis, 3 Me. 103.

with," etc., the case will not be changed, for while such words as "easterly," when used alone in calls from one monument to another, would presume a straight line, yet the law will not so declare where, as in the case of a sinuous water-course, the language of the deed shows that a different line was intended.[79]

§ 380. **Estoppel in pais.** Questions arising out of disputed boundary lines are frequently settled by estoppels *in pais* growing out of the acts or declarations of the party who afterwards asserts rights in respect to such boundaries. Thus, where one is negotiating for the purchase of a piece of land adjoining the lands of another, and the latter points out to him a line which he says is the division line between the two pieces, he will be estopped by such statements from showing the line to be further over on the same tract, where the party making the purchase relies or acts upon these representations.[80] It is essential, however, to the creation of an estoppel of this character, that the party to whom the representations are made should rely and act upon them; he must have been induced to believe in the existence of a certain state of facts, and to act upon that belief so as to alter his condition.[81] In this all the authorities agree; and hence, if subsequent circumstances tend to disprove any such belief, or to show that it was not relied upon, the party making the representations will not be estopped, and may set up a claim inconsistent with his former statements.[82]

§ 381. **Statements of quantity.** Where the quantity of a tract of land is stated in the deed as well as the metes and bounds, the latter, if they can be ascertained with certainty, will control the location, although they contain less than the given quantity—the designation of quantity never being permitted to control the boundaries where they are clearly indi-

[79] Fratt v. Woodward, 32 Cal. 319; Hicks v. Coleman, 25 Cal. 143.

[80] Spiller v. Scribner, 36 Vt. 247.

[81] Martin v. Zellerbach, 38 Cal. 300; McCabe v. Raney, 32 Ind. 309; Horn v. Cole, 51 N. H. 287.

[82] As where the purchaser afterwards enters into agreements with such coterminous proprietor to have a line run with a view to establishing where it ought to be. Russell v. Maloney, 39 Vt. 579.

cated.[83] But where there is doubt as to the true description, such designation of quantity may be properly considered.[84]

As a rule, however, a recital in a conveyance of land that the tract contains a certain number of acres will always, unless there is an express covenant as to quantity, be regarded as part of the description merely, and will be rejected if inconsistent with the actual area as ascertained by known monuments and boundaries. Such recital aids but does not control the description of the granted premises.[85] The word "about," so frequently employed in connection with statements of quantity, is generally regarded as a word of approximation only; it will not cover any material deficiencies.

§ 382. **Streets and highways.** The general rule is now well settled that a grant of land bounded by a street or highway, whether the same be public or private, carries the land to the middle of such way; and such is the established presumption, governing the construction of a contract or deed, in the absence of controlling words.[86] This presumption has in a number of instances been held to be so strong that it is not rebutted even where the calls of the deed describe a line as running from a fixed point a certain distance to the highway and thence along the same, and the distance, upon measurement, carries the line only to the side of the highway;[87] for by the well-known rules of construction, calling for localities, measurements must yield to monuments. Where lands are described as bounded on lands of another or upon roads, ways,

[83] Ayers v. Watson, 113 U. S. 594; Fuller v. Carr, 33 N. J. L. 157; Campbell v. Johnson, 44 Mo. 247.

[84] Field v. Columbet, 4 Sawyer (C. Ct.) 523.

[85] Fuller v. Carr, 33 N. J. L. 157; Campbell v. Johnson, 44 Mo. 247; Clark v. Scammon, 62 Me. 47.

[86] Newhall v. Ireson, 8 Cush. (Mass.) 595; Motley v. Sargent, 119 Mass. 235; Champlain v. Pendleton, 13 Conn. 23; Buckman v. Buckman, 12 Me. 463; Low v. Tibbetts, 72 Me. 92; Moody v. Palmer, 50 Cal. 37; Paul v. Carver, 26 Pa. St. 225; Dunham v. Williams, 37 N. Y. 251; Bissell v. R. R. Co., 23 N. Y. 64; Taylor v. Armstrong, 24 Ark. 107; Marsh v. Burt, 34 Vt. 289; Kimball v. Kenosha 4 Wis. 331; Warbritton v. Demorett, 129 Ind. 346; Florida, etc. R. R. Co. v. Brown, 23 Fla. 104; Salter v. Jonas, 39 N. J. L. 469.

[87] Paul v. Carver, 26 Pa. St. 225; Motley v. Sargent, 110 Mass. 235; Oxton v. Groves, 68 Me. 371; Gould v. Eastern R. R. Co. 142 Mass. 85; Matter of Robbins, 34 Minn. 99; Livingston v. Mayor, 8 Wend. (N. Y.) 85; But see, *contra*, Sibley v. Holden, 10 Pick. (Mass.) 249.

waters, etc., such abuttals are monuments;[88] and where there is a conflict between courses and distances on the one hand and monuments on the other, the description by monuments must control.

Nor does it seem essential, in order to carry a grant to the center of a highway, that the land should even be described as abutting or bounding thereon; and whenever land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee will still take the fee to the middle of the highway, on the line of which the land is situated.[89]

It has been stated, as a reason for the rule, that the adjoining proprietors are presumed to have originally furnished the land in equal proportions for the sole purpose of a highway;[90] and hence in a grant of the adjacent land the soil to the center of the highway passes as a parcel of the land and not as an appurtenant.[91] Ordinarily the ownership of the soil of the street or road is of no practical use to the grantors of the adjacent property; and usually there is no purpose to be served in the retention by them of narrow strips or gores of land between the land conveyed and that of other proprietors, while for many purposes such ownership is of special importance to the purchaser.[92] It is presumed, therefore, that the grantor's

[88] Wilder v. Davenport, 58 Vt. 642; Davis v. Rainsford, 17 Mass. 207; Boston v. Richardson, 13 Allen (Mass.) 152.

[89] Gear v. Barnum, 37 Conn. 229; Stark v. Coffin, 105 Mass. 328; Hawesville v. Lander, 8 Bush (Ky.) 679.

[90] Dunham v. Williams, 37 N. Y. 251. This presumption yields when a different intention is clearly manifested, or when the evidence shows there could be no foundation for it; as, where the grantor at the time owned no part of the street, the same being laid out wholly on the land of another. Kings Co. Ins. Co. v. Stevens, 87 N. Y. 293; Champlin v. Pendleton, 13 Conn. 27. Entire street in such case passes to abutting lots under the general description in deed to original proprietor. Taylor v. Armstrong, 24 Ark. 107.

[91] Bissell v. R. R. Co. 23 N. Y. 64.

[92] And so it has been held that, where the owner of a tract of land laid out a street on the outer edge thereof, and then conveyed lots bounding on the street, his grantees took the fee in the whole width of the street. *Re* Robbins, 34 Minn. 99. On the question whether, under a particular description, land passes to the center of a highway or to the thread of a stream, the trivial benefit to the grantor of the fee in the roadway or stream, and the great pos-

land in a street passes under the general description in his deed of the adjoining land with which it is connected or to which it belongs, as part of the same tract, subject, of course, to the public use.[93]

§ 383. **Continued—Unopened streets.** Nor does the mere fact that a street may be unopened vary the rule as above stated, for as between grantor and grantee a street is created where land clearly defined as to its extent and location is devoted to that end by the grant, although it is not then in condition to be used as a street. In such event it may with propriety be referred to in the deed as an intended street; the reference being to physical condition, not to title. The presumption in such case is that the conveyance carries the fee to the center of such proposed street.[94]

sible injury to the grantee from the want of it, are often circumstances of controlling weight. "Ordinarily," says Ladd, J., in Woodman v. Spencer, 54 N. H. 512, "the benefit to the grantor of retaining his right in the soil of the road would be so small as to be almost or quite inappreciable. Ordinarily, the present actual inconvenience to the grantee, together with the possible and even probable damage that may in the future result to him upon a discontinuance of the road, would be a matter of very considerable importance—enough to interfere seriously, in most cases, with the price which could be obtained for the land. It is improbable that a man will insist on an exception the only and certain effect of which must be to materially diminish the salable value of his land, when he is to gain nothing by it. It is improbable that two men have understandingly entered into a bargain which contains a stipulation plainly and clearly to the disadvantage of both. *A priori* they would not be likely to do such a thing; therefore *a posteriori* it is not likely that they would have done it. The language of their deed is to be read in the light of this improbability."

[93] The presumption is so strong that even express measurements have been held not to defeat it. Thus, the owner of land laid out streets and passage-ways, divided it into lots, and caused a plan thereof to be made. He conveyed these lots to different grantees by deeds bounding on the streets and passage-ways, and describing the lots by measurements which excluded them. The deeds referred to the plan, and conveyed a right, as appurtenant to the lot, to use the passage-ways in common with the grantor and his assigns. *Held*, that each grantee took the fee to the center of the street. Gould v. Eastern R. R. Co. 142 Mass. 85.

[94] As, where the owner of land conveyed a portion thereof by a deed which bounded the land conveyed by a street described as laid out upon a map, and provided that it should actually be laid out of a given width, in a subsequent pro-

§ 384. **Continued—Exclusion from grant.** There can be no doubt that the grantor of land abutting on a highway may except the same from his grant. The general presumption in every case is, however, that he did not intend to retain it;[95] and such exception will never be adjudged unless it clearly appears from the language employed that such a course was intended. What language shall be sufficient to exhibit such intention is the point of difficulty upon which courts have differed. The description of the premises in connection with other parts of the grant, and by reference to the situation of the lands and the condition and relation of the parties to the lands conveyed and to other lands in the vicinity, may further be resorted to as an aid in arriving at a solution of the question; and these will often have a very important bearing upon the points involved.[96] Taken in connection with surrounding circumstances, streets will sometimes be excluded from the operation of the grant even without express words of exception or reservation—the language, in the light of the facts, being construed so as to demonstrate an intention that they should not pass.[97]

Another phase of the subject is presented where the contention of the full extent of the grant is raised by the vendor and not by the purchaser. The application of the rule in such case may be productive of results which were not actually contemplated when the agreement was entered into, but

ceeding by his vendee to compel a purchaser to take title under a contract to convey to him to the center of the road it was held that such deed gave title to the center, and that the vendor (the original vendee) had title thereto and that the contract should be specifically enforced against his vendee. Matter of Ladue, 118 N. Y. 213.

[95] Bissel v. R. R. Co. 23 N. Y. 64; Kimball v. Kenosha, 4 Wis. 331; Chatham v. Brainerd, 11 Conn. 60; and see 3 Kent's Com. 433; 2 Wash. Real Prop. 635; Matter of Ladue, 118 N. Y. 213; Silvey v. McCool, 86 Ga. 1; Thomsen v. McCormick, 136 Ill. 135; Palmer v. Dougherty, 33 Me. 502; Paul v. Carver, 26 Pa. St. 223.

[96] This is particularly true in the case of private ways.

[97] The New York cases favor the construction that where the description commences or carries the land to the *side* of the road, with specified courses and distances, the soil of the street is by necessary implication excluded; that the points thus established are controlling monuments, and that all lines must conform to the points thus designated. See Jackson v. Hathaway, 15 Johns. 447; English v. Brennan, 60 N. Y. 609. The same construction has been had in Mas-

which, nevertheless, legitimately flow from it. Thus, when an agreement for the purchase of land at a certain price per acre, after survey made, calls for a street or highway as one of the boundaries, the purchaser must pay for the land to the middle line of such street or highway, unless a contrary intention plainly appears. It is presumed that in fixing a price per acre of land abutting upon a street, all matters which increased or diminished its value were considered and allowed their proper influence. Sales of this kind are not unusual, and in such cases the acreage must be ascertained by a survey in accordance with the boundaries called for, while the fair and just conclusion is that, in arriving at the price per acre, the public easement and other matters affecting the value of the property received such consideration as they were entitled to.[98]

§ 385. **Continued—Where grantor is without title.** While the rule is well settled that general terms of description in a deed, like "to," "upon" or "along the highway," raises a presumption that the parties intended the conveyance to be to the middle or center line, and that such operation will be permitted for the deed notwithstanding that the portion of the land embraced in the limits of the road is not covered by the description in express terms, it must nevertheless be remembered that the rule is one of construction only, and is limited to those cases where the grantor owns the fee of the highway. The grantor owning the fee, the law presumes he intended to convey it and not retain a narrow and ofttimes long strip of land, which, for all practical purposes, would be of no value to him. But where the grantor does not own the fee of the land the law will not presume that he intended to convey that which he did not own; and a deed bounded on a highway would, in such case, be satisfied by title extending to the side of the road. The grantee would have all the land described in the deed, and the grantor would not be liable for a breach of his covenants.[1]

sachusetts. See Sibley v. Holden, 10 Pick. 249; Smith v. Slocomb, 9 Gray 36; and see Cottle v. Young, 59 Me. 105. Where a deed calls for the line of a street as the monument, the line of the street as it is opened and built upon will be held to be the line intended. De Veny v. Gallagher, 20 N. J. Eq. 33.

[98] See, Firmstone v. Spaeter, 150 Pa. St. 616.

[1] Dunham v. Williams, 37 N. Y.

§ 386. **Effect of grant bounded on highway.** Where land is granted bounded upon a street or highway, such form of expression in the deed is not merely a description, but an implied covenant that there is such a street;[2] and such descriptive words, particularly if the deed refers to a plat, are not to be understood as merely signifying that the street in question is co-extensive with the lot conveyed, but that its extent, direction and termini are to be such as are delineated on the plat or otherwise indicated by the deed.[3] But this is practically the full effect of such a description. The recital of a street as a boundary cannot be understood to be an assurance or implied covenant that it has been constructed and put into condition for present use as a passage-way;[4] nor will it impose upon the grantor any obligation to grade and construct it at his own expense. The most that can be said is that it amounts to an appropriation or setting apart of a portion of the adjacent land to that use.[5]

§ 387. **Exception of highway.** Ordinarily a grant of land bounding upon a highway carries the estate of the vendee to the center line thereof, and that he should so take is usually the intention of the parties. Where highways and roads are excepted, as is frequently the case, the deed is always construed strongly against the grantor;[6] and unless it is unmistakably apparent by the express terms of the exception, or the language employed in describing the grant, that the soil of the road-bed was intended, such exception will be held to apply only to the easement of the public incident to the uses of a public way, while the grant will be held to convey the *locus* to the center of the road.[7] This is particularly true where the exception describes the road as "laid out over said

251; Church v. Stiles, 10 Atl. Rep. 674 (Vt.).

[2] Parker v. Smith, 17 Mass. 413; White v. Smith, 37 Mich. 291; Transue v. Sell, 105 Pa. St. 604.

[3] Thomas v. Poole, 7 Gray (Mass.) 83. Compare Walker v. Worcester, 6 Gray (Mass.) 548.

[4] Loring v. Otis, 7 Gray (Mass.) 563.

[5] Hennessey v. R. R. Co. 101 Mass. 540.

[6] Worthington v. Hylyer, 4 Mass. 196; Wyman v. Farrar, 35 Me. 64.

[7] Kuhn v. Farnsworth, 69 Me. 404; Moulton v. Trafton, 64 Me. 218; Richardson v. Palmer, 38 N. H. 212; Jamaica Pond, etc. v. Chandler, 9 Allen 159; Elliot v. Small, 35 Minn. 396.

land;" for this clearly indicates that it is the easement of public user, and not the land itself, that is in fact excepted.[8]

§ 388. Streams and water-ways. The same principle which in a grant of land bounded upon a highway carries the fee to the center line thereof applies with equal force to fresh-water streams; and when such stream is designated as the boundary the general principle is that there must be a reservation or restriction, expressed or necessarily implied, which controls the operation of the general presumption and makes the particular grant an exception, or else the deed passes the fee to its center.[9] In such cases the general rule is that the grantee takes to the thread of the stream—*usque ad filum aquæ;* and this is usually regarded as the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of water.[10]

An important distinction is to be observed, however, when the channel, and not the river, forms the designated boundary. The channel is regarded as the deepest part of the river—the navigable part—and is something entirely distinct and different from the thread. The thread has been construed to mean the center, whereas the channel may be on one side or the other; and when the grant bounds the land by the channel, the thread of the channel, and not the river, constitutes the boundary.[11]

The foregoing remarks apply without exception to all streams unnavigable in fact, and generally to water-courses

[8] Wellman v. Dickey, 78 Me. 29.

[9] Rice v. Monroe, 36 Me. 309; Luce v. Carley, 24 Wend. (N. Y.) 451; State v. Canterbury, 28 N. H. 195; Cox v. Friedley, 22 Pa. St. 124; Child v. Starr, 4 Hill (N. Y.) 369; Seaman v. Smith, 24 Ill. 521; Braxon v. Bressler, 64 Ill. 488; Lunt v. Holland, 14 Mass. 149; Bradford v. Cressey, 45 Me. 9; Boom Co. v. Smith, 84 Ky. 375; Norcross v. Griffiths, 65 Wis. 610; Watson v. Peters, 26 Mich. 508.

[10] Warren v. Thomaston, 75 Me. 329. The theory on which this law is based seems to be that, as the portion of the stream adjoining the grantee's land is necessary for the enjoyment of the same, and as such portion of the stream is of no value to the grantor, it must be presumed by granting the land to grant also the portion of the stream adjoining said land; and the law can fix no line between opposite owners except the middle of the stream. Carter v. R. R. Co. 26 W. Va. 644; and see Houck v. Yates, 82 Ill. 179; Cobb v. Lavalle, 89 Ill. 331.

[11] Warren v. Thomaston, 75 Me. 329.

of every description; but in a very few states the statute has in some measure changed the common law, and created a rule that is at variance with the generally-received doctrine in this country. In those states[12] the general principles above stated have been declared inapplicable to the great inland water ways which are used as arteries of commerce and upon which a free navigation is permitted, and grants of land bounded on them extend only to the water's edge.[13] In the federal courts it has been also held that proprietors of lands bordering upon navigable rivers under title derived from the United States hold only to the stream, as by express provisions of the national statutes such rivers shall be deemed to be and remain public highways.[14]

§ 389. Continued—Construction of descriptive terms. In the construction of grants of the character now under consideration, the words "to," "on," "by," "along," "down" and other words of like import have always been held to carry title to the thread or center of the stream.[15] On the other hand, such words as to, on or along "the bank" have been held to indicate a restriction, and to exclude the idea of extending the grant further than the water's edge.[16]

Where lands are conveyed bounding upon a water-course or other varying limit, and reference is also made to a plan, the date of the conveyance, and not the date of the plan, is to be considered in determining the question of the true boundary of the land upon the water limit.[17]

[12] The states in which a positive statute has changed the common law are Alabama, Iowa, North Carolina, Pennsylvania and Tennessee.

[13] See Brown Oil Co. v. Caldwell, 35 W. Va. 95.

[14] See R. R. Co. v. Schurmeir, 7 Wall. (U. S.) 272; Forsyth v. Small, 7 Biss. (C. Ct.) 201; State v. Milk, 11 Fed. Rep. 389.

[15] Pike v. Munroe, 36 Me. 309; Warner v. Southworth, 6 Conn. 470; Magnolia v. Marshall, 39 Miss. 109; Thomas v. Hatch, 3 Sumner (C. Ct.) 170; Luce v. Carley, 24 Wend. (N. Y.) 451; Phinney v. Watts, 9 Gray (Mass.) 269.

[16] Bradford v. Cressey, 45 Me. 9; Child v. Starr, 4 Hill (N. Y.) 369; Rockwell v. Baldwin, 53 Ill. 19.

[17] Jones v. Johnston, 18 How. (U. S.) 150. The right which the owner of a water lot has to the accretions in front of it depends on its condition at the date of the deed which conveyed him the legal title, and cannot be carried back by relation to the date of the title bond under which he procured his deed. Id.

A grant bounded by the "shore" of a stream or river does not receive the same construction as a similar grant where the land in question abuts upon the sea or any of its arms or estuaries; for upon an inland river there is no shore in the legal sense of that term—that is, a margin between high and low tide.[18] The banks of a river belong to the riparian owner, and he possesses the absolute fee down to low-water mark.

It may be said, however, that the word "shore" has been productive of more diversity of opinion, with respect to its effect and interpretation, than any of the other terms above mentioned. A number of the authorities regard it, when employed to indicate a boundary, as conveying the entire riparian interest and, hence, the boundary of a tract so described is held to be the thread of the stream.[19] But in some cases the term has been construed to mean only the point of contact of the bank with the water—the low water mark,[20] while in one case it has been given a still more restricted meaning which virtually excludes the whole shore from the land conveyed.[21] If we shall adopt in this connection the generally received rules relating to grants of land abutting or bounding on highways, and the analogy between the two descriptions is very strong, then the first mentioned view must be taken as correct and the latter as wrong. Yet as this is a matter wholly within state control, and as the policy of the states with respect to riparian rights is not uniform, we must continue to expect contrary decisions.

But while the proprietor of land situated upon a non-navigable stream or river is presumed to own to the center or thread thereof, and a conveyance by him bounding upon such stream is presumed to carry the grant to such center, it must be remembered that the principle is only a presumption, for one man may own the bed of such a stream and another may own the banks; and where in a deed conveying land the boundary is limited to the "bank" of the stream instead of bounding it "on" or "along" the stream, the presumption, it

[18] Bainbridge v. Sherlock, 29 Ind. 364.

[19] Sleeper v. Laconia, 60 N. H. 201; Starr v. Child, 20 Wend. (N. Y.) 149; Gavit's Admrs. v. Chambers, 3 Ohio 495; Handly's Lessee v. Anthony, 5 Wheat. (U. S.) 384.

[20] Stevens v. King, 76 Me. 197.

[21] Storer v. Freeman, 6 Mass. 435.

has been held, must fail.[22] Such a description, it is held, necessarily excludes the stream itself, upon the familiar principle that every express grant fixes its own limits and determines the rights of the parties; and as an owner may sell his land without the privilege of the stream, he will be presumed to do so if he bounds his grant by the bank.[23]

There is also a marked exception in respect to the rules of construction relating to lines and courses, as usually applied, when the grant bounds on a water-way. Ordinarily where a course is indicated from one fixed point to another a straight line is intended, but in riparian grants where a certain distance is called for from a given point to another given point on the stream, to be ascertained by measurement, such measurement must be taken by the meanders of the stream and not in a straight line.[24]

§ 390. **Lakes and ponds.** The principles which have been discussed in the preceding section must be understood as applying only to rivers, streams and ponds of circumscribed area. They do not apply to grants bounding on the great inland lakes or other large bodies of standing fresh water. The word "stream" has a well-defined meaning, wholly inconsistent with a body of water at rest; it implies motion—a flowing current—and contemplates a comparatively narrow channel into which the lines of riparian owners can be extended at right angles without interference or confusion, and without serious injustice to any one. It is but natural, therefore, when such streams are called for as boundaries, to hold that the real line between opposite shore-owners should be the center or thread. But when this rule is attempted to be applied to lakes and ponds, numerous practical difficulties are encountered. They have no current, and, being more or less circular, it is hardly possible to run the boundary lines beyond the water's edge so as to define the rights of shore-owners in the beds. There may be instances where, from the contracted area or peculiar character of the configuration of a pond, a grant will be presumed to include it;[25] indeed, this

[22] Rockwell v. Baldwin, 53 Ill. 19.

[23] Hatch v. Dwight, 17 Mass. 298; Child v. Starr, 4 Hill (N. Y.) 369; Bradford v. Cressey, 45 Me. 9; and see Daniels v. R. R. Co. 20 N. H. 85; McCulloch v. Aten, 2 Ohio 425.

[24] Brown Oil Co. v. Caldwell, 35 W. Va. 95.

[25] Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102. In this case a grant

is the established doctrine in some states,[26] and the rules relating to grants upon streams are held to apply;[26a] but ordinarily, where a grant is bounded on a natural lake or pond, the title extends only to low-water mark, or to that line where the water usually stands when unaffected by any disturbing cause.[27] The riparian rights of the adjoining proprietor are all preserved intact, and any privilege which he possesses distinct from the rest of the public may be retained by him or conveyed to others; but his ownership in the abutting land terminates at the water's edge.[28]

The distinction between a stream and a pond or lake seems to be, as above indicated, that in the one case the water has a natural motion or current, while in the other the water is, in its natural state, substantially at rest. And this is so independent of the size of the one or the other. The fact of some current in a body of water is not, however, of itself sufficient in every instance to make it a stream; nor will the swelling out of a stream into a broad sheet necessarily make it a lake.[29]

While the foregoing expresses the general doctrine of the volume of authority upon the subject there are yet many cases holding to the contrary and which refuse to make any dis-

bordering on a pond five miles long and three-fourths of a mile wide, with no current and no main channel, and not generally navigable, was held to carry title to the center.

[26] Particularly in New York and those states which adopt the New York rule. The Massachusetts rule holds to the contrary and this rule seems to have the largest adherence.

[26a] Smith v. Rochester, 92 N. Y. 463; Gouverneur v. Ice Co. 134 N. Y. 355.

[27] Lincoln v. Davis, 53 Mich. 375; Wheeler v. Spinola, 54 N. Y. 377; (This case, involving special features, has been much criticised in New York.) Robinson v. White, 42 Me. 209; State v. Gilmanton, 9 N. H. 461; Jakeway v. Barrett, 33 Vt. 316; Seaman v. Smith, 24 Ill. 521; Paine v. Woods, 108 Mass. 160; Mariner v. Schulte, 13 Wis. 775; Wood v. Kelley, 30 Mo. 47; Kanouse v. Stockbower, 48 N. J. Eq. 42; Boorman v. Sunnuchs, 42 Wis. 233; Trustees v. Schroll, 120 Ill. 509.

[28] Bradley v. Rice, 13 Me. 201; Waterman v. Johnson, 13 Pick. (Mass.) 261; Wheeler v. Spinola, 54 N. Y. 377; Warren v. Chambers, 25 Ark. 120; Nelson v. Butterfield, 21 Me. 229; Primm v. Walker, 38 Mo. 99.

[29] A body of water five or six miles long, and in some places a mile in width, which is fed by springs, and has no connection with a river or other stream except by a slough, which is dry during the summer, and the body of

tinction between non-navigable lakes and streams in respect to construction and extent of grants bounding upon them.[30]

§ 391. **Continued—Artificial waters.** While the rule is general that land bounded upon a natural lake or pond extends only to the water's edge, particularly when so described, a different rule seems to prevail in respect to the construction of grants bounding lands on a lake or pond created by artificial means. If the pond is caused by damming back the waters of a natural stream, the grant extends to the middle of the stream in its natural state,[31] unless the pond has been so long kept as to become permanent, and to have acquired another well-defined boundary.[32]

§ 392. **High-water mark.** Where the land conveyed is described as extending to or bounded by "high water-mark," this is considered an explicit boundary—a fixed and permanent line as it existed at the time of the acceptance of the deed, and does not follow the after-changes of the water line;[33] and it seems that a grant of land bounded by or along a "beach," ordinarily, and in the absence of any language in other clauses of the deed, or of anything in the situation of the lands granted, or other circumstances authorizing a different interpretation, conveys title only to high-water mark.[34]

Ordinarily in a grant of lands under the name of a "beach" or a boundary of lands upon or by or along a "beach," the word would be held synonymous with the shore or strand, and as having reference to and including only the lands washed by the sea, and between high-water mark and low-water mark. "In the case of a boundary," observes Allen, J., "it would be necessary so to restrict the meaning of the word in order to have a certain and definite limit to the lands

water in its natural state has no current, is a lake and not a stream of water. Trustees of Schools v. Schroll, 120 Ill. 509.

[30] See Gouverneur v. Ice Co. 134 N. Y. 355; where the subject is exhaustively discussed; also, Hardin v. Jordan, 140 U. S. 371; Indiana v. Milk, 11 Fed. Rep. 389; Ridgway v. Ludington, 58 Ind. 248.

[31] Commissioners v. People, 5 Wend. (N. Y.) 447; State v. Gilmanton, 9 N. H. 463; Lowell v. Robinson, 16 Me. 360; Fletcher v. Phelps, 28 Vt. 257; and see Ang. Waters, § 44.

[32] Waterman v. Johnson, 13 Pick. (Mass.) 265.

[33] Cook v. McClure, 58 N. Y. 437.

[34] Trustees of East Hampton v. Kirk, 68 N. Y. 459.

granted. If held to mean the sandy land or flats between the upland and the shore, which is frequently formed by a change of the shore line, and is not unfrequently called a 'beach,' it would be quite too uncertain and indefinite to constitute a line bounding lands granted."[35] It may sometimes happen, however, that the situation of the lands granted, or other circumstances, may authorize a different interpretation, and the word "beach" may be taken to mean the sandy plain or flat which lies between the upland and the actual shore line; and this view has been adopted in some cases where a substitution of the word "flat" has been made for "shore" in order to give effect to the manifest intention of the parties.[36]

§ 393. **Tidal waters.** By the rules of the common law only those waters where the tide ebbs and flows are deemed navigable in law, notwithstanding they may be so in fact; and it is to the influence of this rule that the general doctrine of riparian titles on non-navigable water-courses owes its origin and continued existence. Grants of land bounded on tidal or navigable waters are deemed to extend only to high-water mark,[37] which is the line defined by the usual high tide,[38] while the title to the strip of land which lies between high and low-water mark remains in the government for the use of the public.[39]

[35] Trustees of East Hampton v. Kirk, 68 N. Y. 459.

[36] In Storer v. Freeman, 6 Mass. 435, Chief Justice Parsons in interpreting a deed substituted the word "flats" for "shore," in the description, to give effect to the intent of the parties, and held that the land conveyed extended to the "flats," but did not include any part of them. The reasons given by the chief justice in this case for restricting "shore" to the ground between ordinary high-water mark and low-water mark are equally applicable to a boundary upon or by or along a beach. He says: "It cannot be considered as including any ground always covered by the sea; for then it would have no definite limit on the sea-board. Neither can it include any part of the land, for the same reason." The definition of the shore is an accurate definition of a beach, having respect to the nature and situation of both. Both words denote land washed by the sea. See Littlefield v. Littlefield, 28 Me. 180; Phillip v. Rhodes, 7 Met. (Mass.) 322.

[37] Adams v. Pease, 2 Conn. 481; Canal Com'rs v. People, 5 Wend. (N. Y.) 423; Haight v. Keokuk, 4 Iowa, 199; Mayhew v. Norton, 17 Pick. (Mass.) 357.

[38] Seaman v. Smith, 24 Ill. 521.

[39] Seaman v. Smith, 24 Ill. 521; Chapman v. Kimball, 9 Conn. 38.

The terms "high" and "low" water mark were first used with reference to tidal waters and have little significance when applied to inland streams or standing bodies of water. High water mark on fresh water rivers and lakes is practically the point when the water impresses upon the soil in such a manner or for such periods as prevent vegetation, and has no reference to the lines reached in case of freshets or other temporary disturbing circumstances.[40]

§ 394. **Riparian boundary as affected by plat.** The questions just discussed and the conclusions reached are subject to some modification when considered in connection with subdivisions and plats. It is conceded that the owner of lands bounded by water may confine his grant of same within such specific limits as he may choose, and hence, a plat, which unequivocally fixes the dimensions of the land conveyed, may exclude the stream and the ground contiguous thereto. But where a plat shows the water as a boundary, notwithstanding that the land has been divided into lots with distinct lines and distances marking their external dimensions, the rule yet seems to be that the water must still be regarded as the true boundary, for the law, in such case, will not presume that the grantor has reserved any proprietary rights in front of the land conveyed.[41]

§ 395. **Exception from riparian grant.** No question can ordinarily arise with respect to the ultimate line of riparian ownership along the high seas or great inland lakes, as the universally conceded rule makes it extend only to high-water mark, whether abutting upon tidal waters, an inland sea or the great lakes, while the title to all lands beyond high-water mark or under water is vested in the state. But with respect to the "shore," and the extent of proprietorship therein, serious and complicated questions will frequently arise out of the language employed by the parties in describing the subject-matter of the grant.

It cannot be doubted that a riparian owner, conveying lands adjacent to navigable waters, may so limit his grant as to reserve to himself not only his riparian privileges in the water,

[40] Dow v. Electric Co. 69 N. H. 498; In re Minnetonka Lake Impt. Co. 56 Minn. 513; Houghton v. R. R. Co. 47 Iowa 370.

[41] Watson v. Peters, 26 Mich. 508.

but also subsequent accretions to the soil formed by the operation of natural causes.[42] This, it is said, follows necessarily from the absolute right which the owner has to impose such terms and conditions upon his grants as he may deem necessary or expedient. A reservation or exception of this character may result from the terms used without an express declaration of intention—as where a line is extended to the "shore" or "beach," and then projected in a direct course to some other point, not following the natural sinuosities of the shore or water-front, the land so described forming a mathematical parallelogram or other plane figure distinctly opposed to the theory of a diversion to accommodate the irregularities of a varying line.[43]

§ 396. **Mines and minerals.** As has been shown, an estate of inheritance in mines may be conveyed distinct from the fee of the land, which may remain in the vendor or another. Such an estate is not inconsistent with the general title to the lands, in which the mines are situated, remaining in the vendor. When not thus severed from the general title of the lands in which they are situated they are part of the lands themselves, and will pass with such without being expressly mentioned in the instrument of conveyance. Yet in the construction of grants of "mines and minerals" courts have often experienced great embarrassment in giving satisfactory answers to the questions raised by the employment of those terms. Ordinarily in such a grant it is clear that the vendor did not intend to include everything embraced in the mineral kingdom as distinguished from what belongs to the animal and vegetable kingdoms; for, if he did, he parted with the soil itself. Such a construction, therefore, would be inconsistent with and repugnant to the tenor of the grant. On the other hand, there exists no more propriety in confining the meaning of the terms to any one or more of the subordinate divisions into which the mineral kingdom has been divided by chemists—either earthy, metallic, saline or bituminous minerals.[44]

[42] People v. Jones, 112 N. Y. 597.

[43] See People v. Jones, 112 N. Y. 597; Higinbotham v. Stoddard, 72 N. Y. 94; and see Wharton v. Brick, 49 N. J. L. 289.

[44] Mineral has been defined: "Those bodies which are destitute of organization, and which naturally exist within the earth or at its surface." Cleveland's Mineral-

In such a case the ordinary rules of construction must govern. The circumstances surrounding the parties, and relating to the subject-matter at the time the grant was made, may be shown as an aid to interpretation; but no extrinsic evidence is admissible for the purpose of showing that the vendor intended to confine the operation of the words to any particular class of minerals or to limit or define their meaning for the purposes of that particular agreement. Parol evidence may be introduced to show the scientific and popular meaning of the words "mines," "minerals," etc., under an exception to the general rule; for where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself. In some cases parol evidence is admissible *ex necessitate;* as, where an ambiguity is created by extrinsic evidence, it may be removed in the same manner.[45]

§ 397. Operation of erroneous deed. While a deed cannot be given legal effect as a conveyance for any other or different property than that which it purports to convey, nor be extended by implication, yet a deed misdescribing the land conveyed will still be sufficient to give an equitable title thereto, and a subsequent deed correcting the mistake will perfect the same into a legal title.[46]

ogy, p. 1. "Substances dug out of the earth or obtained from mines." Bakewell's Mineralogy, p. 7.

[45] As where the allegation is that the defendants are removing from complainant's soil a particular substance or material. The answer is that the defendants have a right to remove it because it was conveyed to them under the term "mines and minerals." The complainant rejoins that those terms did not include the substance in question. The parties must therefore give evidence as to the character of the material, and they may show that it is or is not embraced in the scientific and popular use of the terms employed by the vendor. See Hartwell v. Camman, 2 Stock. Ch. (N. J.) 128. In this case complainant claimed that the grant only included copper; the defendant that it included paint clay. The court held with the defendant.

[46] Fitch v. Gasser, 54 Mo. 267.

CHAPTER XV.

THE ESTATE CONVEYED.

§ 398. Generally.
399. Rule of construction.
400. Legal and equitable estates.
401. Words of inheritance and limitation.
402. Effect of absolute conveyance.
403. Effect of release and quitclaim.
404. Conveyance of estates in fee.
§ 405. Creation of life estate.
406. The rule in Shelley's case.
407. Creation of co-tenancies.
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409. Perpetuities.
410. Entailments.
411. Homesteads.
412. Incidents of the grant as connected with use intended.

§ 398. Generally. While it is customary, and not altogether improper, to speak of the land as the subject-matter of the sale, yet in strict legal contemplation it is the vendor's rights and interests therein as comprehended in the generic term "estate" that are actually bought and sold. The primary object of the deed of conveyance is to evidence such sale, and in former times no little ingenuity was displayed by conveyancers in framing grants of estates to meet and keep pace with the refined subtilties of courts, and the English works as well as a few of the earlier American treatises are replete with much curious but now practically obsolete information upon this point. The real reform in American conveyancing has been effected during the last fifty years; and while the marked differences in the land system of the United States, as compared with European nations, have at all times been conducive to simpler methods of conveyancing than were elsewhere employed, the earlier reports still show that the "rule in Shelley's case," and kindred legal abstractions, were at one time potent factors in the production of much learned discussion, profound opinions and deep and exhaustive reasoning.

The spirit of "reform," which from the inception of the government has been most active in the abrogation of old laws, customs and usages, has made the creation of estates a most simple and in a majority of cases easily understood

matter, and conveyancing has lost its position as an intricate and highly refined science. Technical words of grant and limitation were formerly a necessity to measure and define the nature and extent of the estate conveyed, but so comparatively valueless and without effect have they become that the highest estate known to our law may be created and transferred without them. Covenants that formerly called for highly artificially constructed sentences may now be raised by a single word, and in every other department of conveyancing the departure from old methods is equally noticeable.

Good conveyancing still calls for apt language in the framing of deeds to raise and convey estates; and notwithstanding that the law will supply by implication many of the draughtsman's omissions, yet it will not raise or create estates in opposition to expressed intent, however erroneous such expression may be; nor will it cut down estates which result by implication because of a neglect to insert the proper language to create such lesser estates. Circumstances may induce a modification of this rule where equity is appealed to for relief in cases of fraud, accident or mistake, but at law the rule holds good without exception.

§ 399. **Rule of construction.** The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the parties making the same; and, when this is determined, effect must be given thereto accordingly, unless to do so will violate some established and dominating rule of law. This is so as well in respect to the estate granted as to the parties, the thing granted, or the title. As it cannot be presumed that words or terms in a deed of conveyance were used without a meaning, or without an intention of having some effect given to them, therefore, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument and to each word and term employed, rejecting none as meaningless or repugnant. So, in the construction of estates, the nature and quantity of interest or estate granted by a deed is to be ascertained from the deed itself, and is to be determined by the court as a matter of law.[1]

[1] Lehndorf v. Cope, 122 Ill. 317; Lippett v. Kelley, 46 Vt. 516; Caldwell v. Fulton, 31 Pa. St. 489; Price v. Sisson, 13 N. J. Eq. 178; Bond v. Fay, 12 Allen (Mass.) 88.

§ 400. **Legal and equitable estates.** Estates are classed as legal and equitable, the former being those which have their origin and derive their qualities and incidents from the common law, and the latter those which are derived from the rules and principles which prevail in courts of equity. Formerly every estate was legal, in the proper acceptation of that term, and in the contemplation of law there is and can be but one estate, which may properly be denominated the legal estate. But the introduction of what were known as uses, and the subsequent origination of trusts, where one party held the title but upon some trust or confidence for another, early led the court of chancery to take cognizance of the rights of the beneficiary, and thus there grew up a double ownership of lands thus situated,[2] the interests which were cognizable as such only in a court of equity taking the name of *equitable* to distinguish them from *legal* estates.

As a rule any legal conveyance will have the same effect upon an equitable estate that it would have upon the like estate at law; and whatever is true at law of the latter is true in equity of the former. Thus, the rule in Shelley's case, where it is permitted to operate as a rule, applies alike to equitable and legal estates, and an equitable estate-tail may be barred in the same manner as an estate-tail at law.[3]

§ 401. **Words of inheritance and limitation.** It is an unvarying rule of the common law that an estate of inheritance cannot be created by deed without the employment of the word "heirs;"[4] and in those states where this rule has not been altered by statute, or modified or relaxed by judicial construction, no synonym can supply the omission of this word, nor can the legal construction of the grant be affected by the intention of the parties.[5] In conformity to this rule it is customary to insert words of limitation in the premises of the deed; and this practice, which is sanctioned if not enjoined by all the rules of good conveyancing, is a desirable

[2] Upon the principle that he for whose use the land was designed was the rightful owner thereof.

[3] Croxall v. Shererd, 5 Wall. (U. S.) 268.

[4] In this respect deeds differ from testamentary papers; for in a will, as has been said, "a fee-simple doth pass by the intent of the devisor; but in feoffments and grants the word 'heirs' is the only word that will make an estate of inheritance." Coke, Litt. 8, 9b.

[5] Kearney v. Macomb, 16 N. J.

one to follow, even where its necessity is no longer recognized. But it is also a maxim of the highest antiquity in the law that all deeds shall be construed favorably, and as near the apparent intention of the parties as is possible, consistent with established legal rules; and hence while to create a fee the limitation must be to "heirs," it seems that this may be accomplished either in direct terms or by immediate reference, and that it is not essential that the word be located in any particular part of the grant.[6]

The practical application of the foregoing rules, however, is now very much restricted in the United States; for while words of limitation were once of the very essence of the deed, yet by reason of sweeping statutory provisions, generally enacted throughout the Union, they are now comparatively without value or legal effect. Although invariably inserted by careful conveyancers, they are, in most of the states, no longer necessary to create or convey a fee;[7] and, as a general rule, every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication—the question of the estate transferred being determined rather by the end sought to be attained by the grantor than by the language employed.[8]

In order to create a less estate than a fee, it is not necessary that there should be express words of limitation, either under the statute or at common law. It is sufficient for that purpose if it appear, by necessary implication, that a less estate

Eq. 189; Adams v. Ross, 30 N. J. L. 505. See, also, Jackson v. Meyers, 3 Johns. (N. Y.) 388.

[6] See 4 Kent, Com. 6; Shep. Touch. 101. Where words of inheritance appear only in one part of the deed, which is inartificially worded, but the intention to pass a fee appears from the entire instrument, it will be so construed. Hicks v. Bullock, 96 N. C. 164.

[7] Words of inheritance are no longer necessary in Alabama, Arkansas, California, Dakota, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Oregon, Tennessee, Texas, Virginia and Wisconsin. They would seem to be necessary in Connecticut, Delaware, Florida, Kentucky, Louisiana, Maine, New Jersey, Ohio, Rhode Island and Vermont. In some states, while there is no express provision, the statutory forms would imply that words of inheritance are unnecessary.

[8] Hawkins v. Chapman, 36 Md. 83; Kirk v. Burkholtz, 3 Tenn. Ch. 425; Lehndorf v. Cope, 122 Ill. 317. And see Hicks v. Bullock, 96 N. C. 164; Henderson v. Mack, 82 Ky. 379.

was granted.[9] The better and safer way, however, is to expressly limit a lesser estate and this becomes almost an imperative rule in those states where a deed is presumed to convey a fee unless some inferior estate is expressly mentioned or results by necessary implication.

Corporations, like natural persons, may take land by every method of conveyance known to the law. Having no "heirs" it is customary to insert the term "successors" as a word of limitation, and the employment of such term has been held to create and pass a fee.[10] It does not seem, however, that such word is necessary to convey a fee, independent of the statute which provides for a fee unless restrained by express terms or necessary implication; for admitting that such a grant is strictly only a life estate, yet as a corporation, unless of limited duration, never dies,[11] such estate for life is perpetual or equivalent to a fee-simple, and therefore the law allows it to be one,[12] while it has been held that a deed to a corporation is presumably a conveyance in fee, although the corporation is chartered only for a term of years.[13]

§ 402. **Effect of absolute conveyance.** It is now a general statutory rule that every conveyance of real property shall pass all the estate of the grantor therein, unless a different intent shall appear by express terms or necessary implication. So where a deed purports to convey all the interest and title of the grantor, effect will be given to it accordingly, although he actually held a greater interest than he at the time of the conveyance supposed he owned.[14] So, too, it has been held that if the terms of a deed clearly show that it was meant to pass an absolute estate in the land, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty.[15] This,

[9] Lehndorf v. Cope, 122 Ill. 317.

[10] Storrs Agricultural School v. Whitney, 54 Conn. 342.

[11] In a majority of the states commercial manufacturing and trading corporations are now chartered for a term of years.

[12] Overseers v. Sears, 22 Pick. (Mass.) 122; Congregational Society v. Stark, 34 Vt. 243.

[13] Asheville Division v. Aston, 92 N. C. 578.

[14] A party is bound to know enough about his title not, by his want of knowledge of it, to mislead a purchaser. Thomas v. Chicago, 55 Ill. 403.

[15] Taggart v. Risley, 4 Oreg. 235. By statute, in some states, this result follows.

however, is contrary to the general policy of the law which confines the office of a conveyance to the transmission of whatever estate the grantor may possess; and while after-acquired title is permitted to inure on the principle of estoppel, it is usual only when covenants of sufficient capacity have been inserted in the deed. But this latter rule, while of general application and observance, is not without exception; and under the doctrine of relation, as applied for the protection of *bona fide* purchasers, if a party having the equitable title to land and being entitled to the legal title thereof, conveys the same by a deed purporting to transfer the entire estate, and subsequently acquires the legal title, it will inure to his grantee, notwithstanding such deed was made without covenants of warranty or further assurance.[16] This doctrine proceeds upon the principle that, where there are divers acts concurrent to make a conveyance, estate or other thing, the original act will be preferred, and to this the other acts will have relation.[17]

It is a further rule that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions, and, where an estate has once been granted in the deed, no subsequent clause can operate to nullify it. Thus, if the deed purports to convey all of the interest of the grantor, but a clause is also inserted stating that the interest conveyed is only that acquired by the grantor in some particular manner or from some particular person, the conveyance should be interpreted in the light of the extrinsic facts, and the grant would be a conveyance of whatever interest the grantor had, whether acquired as stated or otherwise;[18] and if it should

[16] Welch v. Dutton, 79 Ill. 465; Jackson v. Ramsay, 3 Cow. (N. Y.) 75. See, also, Crowley v. Wallace, 12 Mo. 145.

[17] The fiction of relation is that an intermediate *bona fide* alienee of the incipient interest may claim that the deed issued to pass the legal title inures to his benefit by an *ex post facto* operation, and thus he receives the same protection at law that a court of equity could afford him. Lessee of French v. Spencer, 21 How. (U. S.) 228.

[18] Miner's Appeal, 61 Pa. St. 283. In this case the grantor, describing herself as J., the widow of M., conveyed to T., "his heirs, executors, administrators and assigns, all her estate, right, title, interest, claim and demand whatsoever" in a certain piece of land, "to have and to hold the premises hereby granted," etc., unto T., his heirs, etc., "for and during the life of the said J.; the interest hereby conveyed being an estate of freehold for and during the life of said J., and being

appear that the grantor had acquired no interest in the manner specified or from the person named, but did own an interest acquired from another person, the interest thus acquired would pass.[19] This is upon the principle that a deed is to be so construed as, if possible, to give effect to it as a conveyance; and if it contains a clause which is repugnant to the general intention of the deed, this clause is void.[20] But where the deed specifically purports to convey only a certain interest or an interest acquired in a certain manner, this has been held to exclude any interest acquired in any other manner. Thus, if the deed purports to convey the interest devised to the grantor in certain property, it does not convey an interest descending to him.[21]

As a general proposition, a deed will not operate to convey a greater interest than it purports to, although the grantor has a power to convey more than is described.[22]

§ 403. Effect of release and quitclaim. A deed by way of release and quitclaim of all the grantor's right and title, purports to convey nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence.[23]

It has been held, however, that this principle is applicable only to a quitclaim deed in the strict and proper sense of that species of conveyance, and that if the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may

all the interest of her, the said J., in the estate of the said M., deceased, as his widow, of, in and to the premises above described." *Held*, that the grant was a conveyance of whatever interest the grantor had as widow or otherwise. And see Little v. King, 64 N. C. 361; Green Bay, etc. Co. v. Hewett, 55 Wis. 96; Maker v. Lazell, 83 Me. 562.

[19] Maker v. Lazell, 83 Me. 562.

[20] Wilcoxson v. Sprague, 51 Cal. 640.

[21] Munds v. Cassidey, 98 N.C. 558.

[22] As where A., holding in his own right a moiety of the property in question, and having a power of attorney to convey the interest of B., the owner of the other moiety, made a deed of mortgage of the whole, without in terms undertaking to convey the interest of B. *Held*, that the deed conveyed only the interest of A. Shirras v. Caig, 7 Cranch (U. S.) 34.

[23] Van Rensselaer v. Kearney, 11 How. (U. S.) 297.

not contain covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding on the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance.[24]

In construing releases, especially where the same instrument is to be executed by various persons standing in various relations and having various kinds of claims against the releasee, general words, though the most comprehensive, are to be limited to particular demands where it manifestly appears, by the consideration, by the recitals, and by the nature and circumstances of the demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties.[25]

§ 404. Conveyance of estates in fee. The highest estate in land known to our law is called the fee, or, as it is sometimes written, the *fee-simple*—a term indicative of absolute and unqualified ownership with all its incidents.[26] The name itself is borrowed from the feudal system of England, and originally denoted the tenure by which the land was held; but aside from this there is nothing feudal about it, while the title to all lands in the country is strictly allodial.

In all sales of land, unless some lesser estate is specifically mentioned, the subject of the sale is understood to be the fee. Formerly much care and circumspection was required in drawing conveyances of the fee, and parties not infrequently defeated their own intentions by the ignorant or negligent omission of words which were considered essential to the creation of this estate. These were known as words of limitation, and consisted of the words "heirs" or "heirs and assigns forever." Great importance was attached to their use, and, notwithstanding the parties may have intended to convey the

[24] See Van Rensselaer v. Kearney, 11 How. (U. S.) 297.

[25] Rich v. Lord, 18 Pick. (Mass.) 322; Lyman v. Clark, 9 Mass. 235.

[26] The fee-simple was divided by Coke and the earlier writers into fee-simple absolute, fee-simple conditional and fee-simple qualified or base fee, and to some extent this classification seems to have been recognized by American courts during very recent years; yet, as was observed by Mr. Preston (1 Prest. Est. 429), in point of accuracy it

fee, courts refused to give effect to such intention where all mention of the heirs was omitted. It is still customary to insert these words in deeds of conveyance, but they are no longer necessary to create or transfer a fee; and as a rule every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication.[27]

§ 405. **Creation of life estate.** The authorities are not in accord with respect to the creation of life estates, nor in the construction to be placed upon the operative words of purchase or limitation employed in conveyances. The rule in Shelley's case is frequently resorted to as an aid in construction; yet as this rule does not have a uniform operation in all of the states, and is denied in a few, it does not furnish a safe guide, and being at best but a technical rule is never allowed to control a manifest and clear intent. In a majority of the states special statutes have been enacted with reference to the creation of estates and the manner of their conveyance; and while these statutes preserve a general resemblance to each other and operate mainly in a uniform manner, yet slight divergences exist among them all, and for this reason the reported cases are not always reliable as rules unless the particular statutes to which they refer or which control their inclination are also known and understood.

By the rule of the common law a grant to one with no words of limitation, that is no words of inheritance, has the effect of raising a life estate in the grantee, but in most of the states this rule has been changed by statute, and now, in the absence of an express limitation for life, the question is largely one of intention and judicial construction. The proper course is to expressly limit the estate and this may be accomplished by a grant to one "for and during the term of his life."[28] Where the grant is to two or more and it is intended that the estate shall cease on the death of either, then the estate should

cannot be properly a fee-simple if it is either base, conditional or qualified.

[27] Merritt v. Disney, 48 Md. 344. This is a statutory rule in most of the states.

[28] A common, but erroneous, practice is to limit the estate for the *natural* life of the grantee. This is a survival of archaic English law. As we have no civil death in this country this form of limitation is meaningless.

be expressly limited for their joint lives; if it is intended that the estate shall continue to the survivor it is well so to limit it, but words of survivorship are not essential as a grant to the tenants generally for their lives would have the same effect.

A conveyance of land directly to a woman and her children, without other words, she then having children, will usually have the effect to vest the title in her and her children equally,[29] such construction being in strict accordance with the rule of the common law which provides that where a conveyance is made to two or more, with no specification of the estate or interest which each shall have, they shall all share equally.[30] It would seem, however, that a very slight indication of an intention that the children shall not take jointly with the mother will suffice to give the estate to the mother for life, with remainder in fee to her children;[31] and even though she may have no children living, as if she is unmarried, she will yet take but an estate for life, while a contingent remainder will be created in favor of her children, who when born will take an absolute fee.[32]

§ 406. The rule in Shelley's case. Among the early legal abstractions which grew out of the efforts of jurists to carry into effect the general intent of a grantor or testator by annexing particular ideas of property to particular modes of expression was the adoption of the principle that, where a conveyance is made to a person for life, remainder to his heirs or the heirs of his body, instead of giving him a life estate and a contingent remainder to the heirs, it vests a fee-simple or an estate-tail in the first grantee. This construction is said to have been adopted for the purpose of saving to the lord the profits or perquisites incident to inheritances, and also upon

[29] Hickman v. Quinn, 6 Yerg. (Tenn.) 96; Loyless v. Blackshear, 43 Ga. 327; King v. Rea, 56 Ind. 1; Barber v. Harris, 15 Wend. (N. Y.) 615.

[30] As where a deed conveyed land to A. as trustee for his wife and "her present heirs;" *held*, that she and the children that she then had were tenants in common. Chess-Carley Co. v. Purtell, 74 Ga. 467.

[31] Moore v. Simmons, 2 Head (Tenn.) 506; Blair v. Vanblarcum, 71 Ill. 290. As where the deed is to one and "the heirs of her body." Frazer v. Supervisors, 74 Ill. 282.

[32] Frazer v. Supervisors, 74 Ill. 282. The grantor in such case thereby deprives himself of all estate but a contingent reversion dependent upon the grantee dying without issue.

the general ground of preventing an abeyance of the fee, which would render it inalienable during the life of the first taker. The principle was recognized from a very early period, but only became finally established in a proceeding called "Shelley's case;" and from the notoriety which the case has received from its subsequent frequent citation in connection with the application of the rule therein laid down, it has acquired a world-wide renown as "the rule in Shelley's case."[33]

This remarkable rule has been productive of an almost incredible amount of controversial disquisition and an apparently innumerable number of decisions both in England and the United States; and, notwithstanding the fact that in this country there can be no entailed estates, strictly speaking, the rule still has a modified force, and is often resorted to as a rule of construction, particularly in cases where the questions involved turn upon the point as to whether the conveyance which forms the foundation of title passed only a life estate or a fee.

The rule as defined by Kent is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."[34] Mr. Preston, in his essay on the rule in

[33] The facts of this celebrated case were as follows: E. Shelley, tenant in tail, suffered a recovery and declared the uses of it to himself for life, without impeachment of waste, remainder to a trustee for twenty-four years, remainder to the heirs male of the body of E. Shelley and the heirs male of the body of such heirs male, remainder over. *Held*, by the chancellor and all the judges except one, that E. Shelley took an estate-tail. The decision rested upon the ground that if R. Shelley, the first son of E. Shelley, took by purchase and not by inheritance, then no other son of E. Shelley could ever take the estate, which would disappoint the word "heirs" (of E. Shelley) in the deed; and that the limitation to the heirs male of the heirs male of E. Shelley did not control the prior limitation, but was merely declaratory, because every heir male of the heir male of E. Shelley was an heir male of E. Shelley himself. 2 Hill. Abridg. 22.

[34] 4 Kent, Com. 225. When the

Shelley's case,[35] among several definitions, gives the following: "In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body he takes a fee-tail;[36] if to his heirs, a fee-simple."[37] The definition by Kent is that which is generally received as an authoritative exposition of the doctrine; and as estates-tail have been generally abolished in this country, the rule thus stated applies generally to all cases where there is a grant of a particular estate to the grantee with remainder over to a class of persons designated as heirs. In such cases, under the rule, the words "heirs" or "heirs of the body" are regarded as words of limitation and not of purchase.[38] In some states, however, while estates-tail as they existed under the old law have been abolished, yet the statute has saved the entail to the first degree, thus giving a life estate to the first taker and vesting in the second taker a remainder in fee. In those states, therefore, when the remainder is to the "heirs of the body" the estate thus conferred is in the nature of, if not an estate-tail, to which the rule in Shelley's case does not apply. The words of heirship and procreation, in such event, will be regarded as words of purchase and not of limitation, and the first taker will take

rule applies the ancestor has the power of annihilation, for he has the inheritance in him; and when it does not apply the children or other relations, under the denomination of heirs, have an original title in their own right and as purchasers by that name. The policy of the rule was that no person should be permitted to raise in another an estate of inheritance and at the same time make the heirs of that person purchasers. 4 Kent, Com. 216.

[35] 1 Prest. Est. 263.

[36] An estate-tail is where lands are given to one and the heirs of his body begotten. Both the words of inheritance and words of procreation must appear. 2 Black. Com. 115. This point becomes important in this connection where, as in some estates, the entail is saved to the first degree. See Butler v. Huestis, 68 Ill. 594.

[37] 1 Prest. Estates, 263.

[38] See Bradford v. Howell, 42 Ala. 422; Forrest v. Jackson, 56 N. H. 357; Smith v. Block, 29 Ohio St. 488; King v. Rea, 56 Ind. 1; Butler v. Huestis, 68 Ill. 594; Baker v. Scott, 62 Ill. 86. Thus, a deed which "conveys and warrants" certain real estate to the grantee "during her life, in remainder to the issue of her body, their heirs and assigns forever," falls within the rule in Shelley's case, and vests in such grantee the title to such real estate in fee-simple, the words

only a life estate, while the heirs of his body will take the remainder in fee.[39]

With respect to the effect of this rule the authorities differ. Thus, in some instances it is held that the rule is not one of construction, but an inexorable rule of law, that where the ancestor takes a preceding freehold a remainder shall not be limited to his heirs as purchasers.[40] On the other hand, it is held in well-considered cases that the rule, at most, is only a technical rule of construction, and must give way to the clear intention of the donor, when that intention can be ascertained from the instrument in which the words supposed to be words of limitation are used.[41] This is the view now generally taken.

§ 407. **Creation of co-tenancies.** The statute now generally defines the character of the estate taken under a deed or devise to a number and usually fixes the same as a tenancy in common unless it is expressly provided otherwise, by proper words of limitation, in the instrument of conveyance. This is a complete reversal of the old rule of the common law, with which joint tenancy seems to have been a favorite, for by that rule no special words of limitation were necessary to create the estate while words or circumstances of negation were necessary to avoid it. At present, however, when it is intended that parties shall take as joint tenants the fact must be clearly and sufficiently stated by the use of apt words. This may be accomplished beyond question by a succinct statement that the estate is to be held "in joint tenancy and not in common," but usually a conveyance to several persons "jointly," without any expressions indicating that it shall be divided among them, will have the effect of vesting an estate in joint tenancy.[42] No words of limitation are necessary to create an estate in common.

§ 408. **Future estates.** Broadly stated, no estate in real property can be bargained, sold or released before it is acquired by the grantor. A mere expectation or belief that a party will at some future time acquire an interest in certain

"issue of her body" being words not of purchase but simply of limitation. King v. Rea, 56 Ind. 1.

[39] Butler v. Huestis, 68 Ill. 594.

[40] See Ridgeway v. Lamphear, 99 Ind. 251; Ware v. Richardson, 3 Md. 505; Cooper v. Cooper, 6 R. I. 261.

[41] Belslay v. Engel, 107 Ill. 182.

[42] Case v. Owen, 139 Ind. 22.

property is not in itself an estate or interest of any kind, and cannot be conveyed by deed.[43] But where lands are conveyed by deed of bargain and sale simply, which ordinarily operates only to transfer vested estates and interests, if it distinctly appears on the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently-acquired interest.[44]

Where the grantor actually possesses a full estate in land he may, as a rule, carve out of it an estate to commence *in futuro*. At common law an attempt to create or convey a freehold or estate of inheritance *in futuro* was a nullity, the nearest approach being a covenant to stand seized to uses; and this was only permissible when the consideration was blood or marriage.[45] But under the statutes now in force in a majority of the states the owner of land may convey, in the manner prescribed, any part or portion of his estate, as he and his grantee may agree, subject only to those restrictions which the law imposes, as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienation. Hence, it has frequently been held that a conveyance of real estate to take effect *in futuro* is good and valid without the creation of any intermediate estate to support it.[46]

[43] Lamb v. Kamm, 1 Sawyer (C. Ct.) 238.

[44] Hannon v. Christopher, 34 N. J. Eq. 459.

[45] Jackson v. McKenny, 3 Wend. (N. Y.) 233; Brewster v. Hardy, 22 Pick. (Mass.) 380; Spaulding v. Gregg, 4 Ga. 81; 2 Black. Com. 338; 4 Kent, Com. 234.

[46] In Shackelton v. Sebree, 86 Ill. 616, the conveyance was not to be recorded or take effect until the death of the grantor. Walter, J., said: "Our statute has abolished livery of seizin, and deeds of feoffment have gone out of use, and lands are conveyed by deed of bargain and sale; and, under the statute of uses, the use is executed and the title passes to the grantee on delivery of the deed. And holding the fee, the law holds he is seized not only of the title, but of the possession, as the fee draws to it possession in law. . . . By giving effect to such conveyances we only estop the grantor by his covenants, and hold that he stands seized to the use of the grantee as in other deeds of bargain and sale. We give effect to the statute of uses. We carry into effect the intention of the parties, and we fail to see that it can work injury

It must be understood, however, that while it is competent for a grantor to convey an estate to commence *in futuro* without any intermediate estate to support it, it is necessary, nevertheless, that the deed should have delivered equally as in case of present grant; and while the title may not actually vest until the death of the grantor, delivery is essential to make the deed effective, and this delivery must be in the grantor's life-time—that is, there must be an actual or constructive delivery during the life of the grantor, or a delivery after his death which takes effect by relation at some period during his life. Thus, a delivery after death may be made by some person holding the deed as a trustee, or having the same in possession as an escrow. A deed will not usually be permitted to perform the office of a will, and if there is no delivery during life there can be none after death.[47]

§ 409. **Perpetuities.** It cannot be said to be other than a natural desire on the part of a land-owner—one, indeed, that seems to be inherent in human nature—to continue his acquisitions in his own family as long as possible, and to erect what in law is termed a perpetuity. It has long been settled in England that real property may be rendered inalienable during the existence of a life or lives in being and twenty-one years thereafter; or, in case of a posthumous child, a few months more, allowing for the term of gestation. Originally only one life in being was permitted, but from one life the courts gradually proceeded to several lives in being at the same time, on the principle that this in fact only amounted to the life of the survivor. Any limitation tending to extend the estate beyond this period is termed a perpetuity, and the limitation is void.

to any one." In Abbott v. Halway, 72 Me. 298, Barrows, J., says: "The mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seizin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate of some sort pass immediately to the grantee in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place and the livery of seizin as occurring at the time fixed in the instrument; and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony." And see Kent v. Atlantic De Laine Co., 8 R. I. 305.

[47] Huey v. Huey, 65 Mo. 689.

Except as altered or abrogated by legislation this rule has practically been adopted in the United States, and forms the basis of methods of construction of deeds and testamentary grants.[48] By statute, in some states, the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate,[49] while a manifest tendency has been generally exhibited by the courts to abridge rather than to enlarge the period of inalienability as being better suited to the nature of our institutions as a free as well as a commercial people.[50] The effect of such statutes, therefore, has been to reduce the scope of the common-law rule with reference to lives by allowing but two instead of an indefinite number, and to abolish altogether the absolute term of twenty-one years, and to allow in its stead an actual minority. A remainder in fee, to take effect after the expiration of two lives in being, may be created in favor of a person not in being at the time; and, it seems, in such case, a further contingent remainder in favor of a person not in being at the creation of the estate may be limited to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years.[51] So that, even under statutes similar to those now under consideration, the power of alienation may lawfully be suspended for the term of a minority, after the expiration of two lives in being, by means of a contingent remainder, to take effect in the event of the death of the first remainder-man in fee during his minority.[52]

§ 410. **Entailments.** At common law a conveyance to a person and the heirs of his body, whether generally or specially, created a conditional fee, which was held to be performed and the fee vested upon birth of issue. It was also held that there was an implied condition that if the donee should die without such heirs the land should revert to the

[48] See Loring v. Blake, 98 Mass. 253; Wood v. Griffin, 46 N. H. 234; Donohue v. McNichol, 61 Pa. St. 73.

[49] This was first enacted in New York with the other sweeping changes made by the Revised Statutes, but has since been re-enacted in other states which have followed in the New York lead.

[50] Coster v. Lorillard, 14 Wend. (N. Y.) 265.

[51] Manice v. Manice, 43 N. Y. 303.

[52] Manice v. Manice, 43 N. Y. 303.

donor.[53] After issue born the conditional estate became absolute, and the grantee might alien the land so as to bar his own issue and the donor. If after such performance of the condition the grantee did not alien the land, and the heir died, then upon the death of the grantee the estate reverted to the donor, to obviate which it was customary for the grantee on the birth of issue to alien and then repurchase, so that he might become vested with a fee-simple absolute that would descend to his heirs generally. This was the state of the law at the time of the adoption of the statute *de donis conditionalibus,*[54] the effect of which was to prevent the grantee from aliening the land after birth of issue, so as to cut off or bar this estate, which descended in like manner from generation to generation to the class of heirs described in the deed to the first donee. The interest created by the operation of the statute finally came to be regarded as a new species of estate to which the conveyancers gave the name fee-tail.

The spirit of the law in the western hemisphere is and ever has been opposed to the tying up of titles in perpetuity by entails; and in every state statutory modifications of the common law exist, designed as well for the protection of the reversion as for the remainders designated in the deed, and at the same time limiting the entail. By these laws a most reasonable middle course has been adopted, equally removed from the injustice of the old common law or the mischievous tendency of the statute *de donis.* Under these statutes the heir at birth takes an absolute estate in fee, while the donee takes a life estate at the delivery of the deed, the fee practically remaining in abeyance, if there be no heir, until birth of issue. In this respect there is an important departure from some of the old canons of the law; yet the authorities seem to be united in declaring that under these statutes the estate in fee

[53] This was a condition annexed to all grants by operation of law, that, on failure of the heir specified in the grant, the grant should be at an end and the land return to the ancient proprietor. 2 Bl. Com. 110. The condition annexed to these fees by the common law was held, where it was to a man and the heirs of his body, to be a gift on condition that it should revert to the donor if the donee had no heirs of his body; but if he had, that it should remain to the grantee. Hence it was called a fee-simple on condition that he had issue; and when the condition was performed by the birth of issue, the estate in the grantee became absolute and unconditional.

[54] 13 Edw. I. ch. 1.

may be in abeyance with no particular estate to support the remainder, nor any person in being to take the inheritance until he comes into being so that it can vest.[55]

The estate thus created cannot be defeated by the life tenant before issue born by alienation to a stranger or by a reconveyance to the grantor.[56]

§ 411. **Homesteads.** The general nature and characteristics of homestead estates having already been alluded to will not receive further consideration in this paragraph.

As a rule no operative words are necessary to create a homestead; and, as this is a matter which lies largely in intention, extraneous circumstances are of more importance than the particular form of conveyance.

The right of homestead will exist and attach to almost any kind of title or interest. It has never been considered necessary that the land should be held by an absolute fee-simple; and, generally, any estate that is vendible under an execution will support the homestead exemption.[57] It has been held to apply to an estate for life[58] as well as to an estate for years,[59] and where the claimant is the owner and in possession it is immaterial in what manner title may have been derived.[60]

The primary design of the homestead laws being to furnish a place of refuge for the family, it is wisely provided that the husband can do no act that will interfere with the occupancy and use of the homestead without the consent of the wife, manifested by a participation in the act of conveyance; and courts, in the construction of this inhibition, have in some cases gone to great lengths in declaring the purport of the law. Not only does this apply to alienations of the fee, but to any lesser estate than can be carved out of the fee;[61] and it has been held that even the alienation or grant of an easement is void as against the rights of the wife unless assented

[55] Frazer v. Supervisors, etc. 74 Ill. 282. The statutes on this subject are not uniform and the doctrine of the text is denied in some states. Nor can the doctrine that the fee may be in abeyance be considered sound.

[56] Frazer v. Supervisors, etc. 74 Ill. 282.

[57] Pilcher v. R. R. Co. 38 Kan. 516.

[58] Deere v. Chapman, 25 Ill. 610; Robinson v. Smithey, 80 Ky. 636.

[59] Patton v. Deberard, 13 Iowa 53; Johnson v. Richardson, 33 Miss. 462.

[60] Robinson v. Smithy, 80 Ky. 636.

[61] In Coughlin v. Coughlin, 26

to by her.[62] To this rule there seems to be but one recognized exception, and that is where the wife herself becomes the grantee of the fee by the conveyance of the husband; in this latter case a deed signed by the husband alone will be valid,[63] though it would seem that in some states this exception is denied.

§ 412. **Incidents to the grant as connected with use intended.** It is one of the oldest and best-settled principles of law that, where anything is granted, all the means to attain it and all the fruits and effects of it are granted also by legal implication, and will pass inclusive, together with the thing, by the grant of the thing itself.[64] So, also, while a mere conveyance of part of a tract of land may not give the grantee the right to make any use of the part granted which will injuriously affect the remaining portion, yet, when the grant is expressed to be for a particular use, neither the grantor nor one claiming under him can object to such use or recover damages resulting therefrom.[65]

Kan. 116, the court held that "the husband cannot, without the consent of the wife, execute a lease of a homestead, and give possession thereof to a tenant." In this case the lease was executed for five years, but in a later case it is intimated that the length of the term of the lease can make no difference. See Pilcher v. R. R. Co. 38 Kan. 516.

[62] Pilcher v. R. R. Co. 38 Kan. 516; but see Chicago, etc. R. R. Co. v. Swinney, 38 Iowa 182.

[63] Burkett v. Burkett, 78 Cal. 310; Harsh v. Griffin, 72 Iowa 608; Riehl v. Bingenheimer, 28 Wis. 84.

[64] Aiken v. Boardman, 2 Met. (Mass.) 457; Fitch v. Johnson, 104 Ill. 111; C., R. I. & P. R'y Co. v. Smith, 111 Ill. 363.

[65] As where the owner of a twenty-acre lot, being desirous of the construction of a railroad over the same, made a deed to the railroad company, reciting that, "in consideration of the premises and $60," he granted, "for the purpose of constructing a railroad and for all purposes connected with the construction and use of said railroad," the right of way for the same, one hundred feet wide, through the lot and other property, "to have, hold and enjoy the land described, with the appurtenances, unto the said" grantee, "and its assigns, forever, for all uses and purposes, or in any way connected with the construction, preservation, occupation and enjoyment of said railroad," with a proviso for a reversion in case the same should cease to be used for railroad purposes. *Held*, that as the casting of smoke, cinders, ashes, sparks of fire and the shaking of the soil upon other parts of the lot was a necessary incident of the railroad, and inseparable from the running of trains thereon, the right to do these acts passed to the grantee and its successors by necessary implication from the express grant. C., R. I. & P. R'y Co. v. Smith, 111 Ill. 363.

CHAPTER XVI.

THE COVENANTS.

§ 413. General observations.
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§ 413. General observations. Covenants inserted in deeds are in the nature of collateral promises of the performance or non-performance of certain acts, or, of agreements that a given state of things does or shall or does not or shall not exist. When relating to title they are inserted for the purpose of securing to the grantee the benefit of the title which the grantor professes to convey, and as an indemnity against any loss that may arise in consequence of any impairment or defect of same. They are said to be *implied,* as where they are raised by intendment of law from the use of certain words, and *express,* as where the promise or agreement is set forth in explicit language declaring the intention of the parties.

The whole doctrine of covenants grew out of the ancient doctrine of warranty, which originally was an implication of the feudal law binding the lord to recompense his tenant, when evicted from his feud, with another of equal value. The term warranty, however, as it is used in connection with covenants of title in this country, has but little affinity with the ancient remedy, and while the name has been retained

the present prevailing doctrine seems to be essentially American both in principle and practice. "There is no evidence," says Mr. Rawle, "that the covenant in such general use in this country, called 'the covenant of warranty,' ever had a place in English conveyancing."[1]

The general use of covenants for title seems to have come into vogue somewhere toward the close of the seventeenth century, superseding the ancient feudal warranty; yet just how they came to be introduced, or how they originated, are matters which legal historians are unable to determine, and the accounts which have come down to us amount to little or nothing more than mere conjectures.[2] The early covenants were expressed in short and simple forms, and it was not until about the time of the restoration of Charles II. that they commenced to assume the shape by which they have since been known.

§ 414. **Creation of covenants.** It is fundamental that no particular form, or expression, or arrangement of words is necessary to create or raise covenants,[3] and that any language showing intention and manifesting a promise is sufficient for the purpose.[4] The artificial rules of conveyancing have prescribed forms, and the law has given specific and well-defined meanings to certain words employed therein; but the liberal

[1] Rawle, Covts. § 13.

[2] Mr. Rawle suggests the following as a possible history of their origin: "So long as livery of seizin was necessary to the validity of the transfer of land, so long did warranty, which was essentially a covenant real, accompany the deed of feoffment. A personal covenant would have been an inappropriate element of such a form of conveyance. But the passage of the statute of uses toward the latter part of the reign of Henry VIII. introduced the conveyances familiar at the present day, which, taking their effect under the statute, passed the freehold without livery of seizin; and in a deed of bargain and sale, or lease and release, a warranty, in its proper sense, would have been just as inappropriate as would have been a personal covenant in a deed of feoffment, while the covenant was eminently fitting. And hence it may be that we find, all through the reports of the time of Elizabeth, cases in which some of the covenants for title—generally a covenant for seizin or of good right to convey—are used in conveyances taking effect by virtue of the statute of uses." Rawle, Covts. § 13.

[3] Jackson v. Swart, 20 Johns. (N. Y.) 85; Bull v. Follett, 5 Cow. (N. Y.) 170.

[4] Taylor v. Preston, 79 Pa. St. 436; Hallet v. Wylie, 3 Johns. (N. Y.) 44.

construction always accorded to stipulations of this character permits the obvious intention of the parties to have effect regardless of the form or phraseology.[5]

§ 415. **Rules of construction.** Covenants are to be construed according to their spirit and intent;[6] they should be considered in connection with the context, and must be performed according to the intention of the parties as derived from both.[7] General covenants may be restricted by special covenants;[8] but the general rule is that all of the covenants are to be construed, as nearly as possible, according to the obvious intention of the parties, which must be gathered from the language of the whole instrument, interpreted according to the reasonable sense of words.[9] In case of doubt they should be construed most strongly against the covenantor and in favor of the covenantee;[10] but this is permitted only as a last resort, and when the clause is equally open to two or more inconsistent interpretations.

§ 416. **Inuring of title.** By the common law, if a grantor who has no interest or only a defeasible interest in the premises granted conveys the same with warranty, and afterwards obtains an absolute title to the property, such title immediately becomes vested in the grantee or his heirs or assigns by operation of the principle of estoppel;[11] and if the grantor or any one claiming title from him subsequent to such grant seeks to recover the premises by virtue of such after-acquired title, the original grantee or his heirs or assigns, by virtue of the warranty which runs with the title to the land, may plead

[5] Johnson v. Hollensworth, 48 Mich. 140; Wadlington v. Hill, 18 Miss. 560.

[6] Ludlow v. McCrea, 1 Wend. (N. Y.) 328; Schoenberger v. Hoy, 40 Pa. St. 132.

[7] Marvin v. Stone, 2 Cow. (N. Y.) 781; Wadlington v. Hill, 18 Miss. 560.

[8] As where defendant, after granting a tract of land described by metes and bounds, added, "containing six hundred acres, and the same is hereby covenanted and warranted to contain at least five hundred acres," and then covenanted generally that he was seized, etc., being the usual general covenants with warranty, *held*, that the general covenants in the deed were restricted by the special covenant as to the quantity of land. Whallon v. Kauffman, 19 Johns. (N. Y.) 97.

[9] Wadlington v. Hill, 18 Miss. 560; Schoenberger v. Hoy, 40 Pa. St. 132; Marvin v. Stone, 2 Cow. (N. Y.) 781.

[10] Randel v. Canal Co. 1 Har. (Del.) 154.

[11] Grand Tower, etc. Co. v. Gill, 111 Ill. 541; Lowry v. Williams, 13

such warranty by way of rebutter or estoppel as an absolute bar to the claim.[12]

This principle has been applied to all suits, brought by persons bound by the warranty or estoppel, against the grantee or his heirs or assigns, so as to give to the grantee and those claiming under him the same right to the premises as if the subsequently acquired title or interest therein had been actually vested in the grantor at the time of the original conveyance from him.

The obligation created by the estoppel binds not only the party making the covenant, but all persons privy to him, whether of blood, law or estate; his legal representatives, his heirs, and all who take his estate by contract stand in his stead, and are subject to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, and becomes a muniment of title, so that all who would afterwards acquire it shall be bound by or may take advantage of the rights which the existence of the fact imposes upon it.[13]

The rule that where a deed conveys a greater interest than the grantor at the time possesses, an after-acquired title inures to the benefit of his grantee, is subject to an exception, however, where such grantor executes to his grantor a mortgage to secure a part of the purchase money on the premises subsequently conveyed by the latter to the former.[14]

§ 417. **What covenants a purchaser has a right to expect.** It would seem to be a well-settled rule in England that a purchaser has no right to demand from his vendor covenants of a greater scope than against his own acts, and this doctrine seems to have found recognition in some of the states of the American Union. The reason of the English rule would seem to be that a man is presumed to sell an estate as he receives it, while the purchaser is presumed to have made all the nec-

Me. 181; Wark v. Willard, 13 N. H. 389; Tefft v. Munson, 57 N. Y. 99; McCusker v. McEvey, 9 R. I. 533.

[12] Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528.

[13] Hill v. West, 8 Ohio 222; White v. Patten, 24 Pick. (Mass.) 324; Dudley v. Cadwell, 19 Conn. 227; Greene v. Clark, 13 Vt. 158.

[14] As where A. executed a deed of conveyance of lands to which he had no title to B., and A. afterward purchased and received a deed for the premises from C., the owner, and executed back to him a mortgage thereon to secure a part of the purchase money, *held*, that the rights of C. under his mortgage

essary inquiries to satisfy himself as to the character of the estate, and the title by which it is derived, prior to that time. The obligation of the vendor, it is contended, is limited to putting the vendee into the same situation in which he stood himself; it is the duty of the vendee to determine, by a proper examination, what the title of the vendor is, and to satisfy himself that the same is marketable. Having done this it rests with him to decide whether he will complete the bargain, and if he decides in the affirmative the vendor makes a conveyance which simply covenants that he has done no act to affect or derogate from his title.

There has been a tendency manifested in some of the eastern states to follow the English system of conveyancing in respect to covenants, and restrict the purchaser to covenants against the grantor's own acts, and in furtherance of this principle an agreement to convey by "warranty deed" has been construed to mean a deed with "special warranty" or a warranty against any acts of the vendor done or suffered and against the acts of those claiming under him.[15] It is to be observed, however, that the states in which this doctrine has been recognized or adopted are few in number, and of that class which has long been ruled by English precedents. In the great majority of the states a contrary rule prevails; and the general American doctrine may be safely stated as that, when one makes a contract of sale for his own benefit, in the absence of any special contract to the contrary, there is an implication from the nature of the transaction that he will make a deed with general warranty.[16] The language of the agreement may sometimes be susceptible of such construction as to negative this implication, as where some special title, or the right, title

were not affected by the prior conveyance from A. to B. Morgan v. Graham, 35 Iowa 213.

[15] Espy v. Anderson, 14 Pa. 312; Cadwalader v. Tryon, 37 Pa. 322. Mr. Rawle states that in the large cities of Pennsylvania, in ordinary cases, a covenant of warranty limited to the acts of the vendor and those claiming under him, and in some instances carried back to the last person claiming by purchase, is the only express covenant for title inserted in the conveyance. Rawle on Covenants, § 29. This rule has also been recognized in Massachusetts, in Kyle v. Kavanagh, 103 Mass. 359.

[16] Faircloth v. Isler, 75 N. C. 551; Allen v. Hazen, 26 Mich. 143; Hoback v. Kilgore, 26 Gratt. (Va.) 442; Travenner v. Barrett, 21 W. Va. 656; Linn v. Barkey, 7 Ind. 70; Bethell v. Bethell, 92 Ind. 318; Bowen v. Thrall, 28 Vt. 385; Clark v. Lyons, 25 Ill. 105; Herryford v.

and interest of the vendor, forms the subject of the sale; but as a general rule, upon an agreement for the sale of land, the vendor, though nothing be said in the contract on the subject, is considered as contracting for a general warranty. This would certainly be the case where the agreement contains stipulations for title, and usually an agreement to convey by "good and sufficient" deed will receive a construction of this character.

Nor is there anything harsh, oppressive or unjust in this rule; on the contrary, it is in consonance with every principle of natural justice, and in its practical application tends to give stability and permanence to real estate titles. Indeed, the very fact that a vendor is unwilling to warrant the title to the property he sells, or at best is unwilling to do more than covenant against his own acts, is, in itself, an imputation of discredit, or, as remarked by Story, J., "a significant circumstance in affecting a purchaser with notice of outstanding equities or paramount title."[17] At the same time there is much to be said in favor of a contrary rule, for the obligation to convey by "good and sufficient deed" imports nothing more than a deed which shall be effective to convey the land with all its incidents and furnish a valid and unassailable title. Where a purchaser expects or requires covenants, such expectation or requirement should, by strict analogy to the law which dominates other species of written contracts, be based upon some positive stipulation or agreement; for the covenants do not constitute title, nor are they in any manner necessary to its proper devolution.

§ 418. **Contract for conveyance with "usual covenants."** It is not uncommon for parties to stipulate for conveyance by deed with "usual covenants," "customary covenants" or equivalent expressions. The question then presents itself, What are "usual covenants?" Probably any well-settled local usage might be shown in such a case to explain the meaning of these words and thereby afford a ground for the interpretation of the deed.[18] It would seem, however, that in the absence of any

Turner, 67 Mo. 296; Taul v. Bradford, 20 Tex. 264; Witter v. Biscoe, 13 Ark. 422; Johnson v. Piper, 4 Minn. 195; Hedges v. Kerr, 4 B. Mon. (Ky.) 528.

[17] See Oliver v. Piatt, 3 How. (C. Ct.) 410.

[18] A usage, if it be ancient, notorious, and reasonable, may enter into and become part of a con-

such usage, or of any attempt to rely on local usage, the true construction would be that the purchaser might insist upon the personal covenants now generally inserted in deeds of conveyance in this country, viz.: that the grantor is lawfully seized; that he has good right to convey; that the land is free from incumbrance; that the grantee shall quietly enjoy; and that the grantor will warrant and defend the title against all lawful claims.[19] The authorities practically agree that all of these covenants, except the last, are the usual covenants in a conveyance of the fee. In England, in lieu of the covenant for warranty, the usual covenant is a covenant for further assurance;[20] but as this covenant is seldom used in the United States it cannot with propriety be classed as a "usual covenant," and the list is as first stated.[21]

§ 419. Contract to convey with warranty. While it was formerly a very common practice for parties to contract for conveyance by "good and sufficient deed," it is now a more general custom to stipulate for a deed with warranty; and while there are a few decisions which hold that this clause is satisfied by the production of a deed regular in form and containing the usual covenant of general warranty, the prevailing doctrine would seem to be that the stipulation is only satisfied by an operative conveyance, sufficient both in form and substance, and conveying a valid title to the land which the covenantor has agreed should be conveyed;[22] that the agreement is not complied with by the mere giving of a warranty deed, where the grantor has no title to the land or where his title is imperfect.[23]

But this result follows, perhaps, as much from the general rules of law in respect to the right of the purchaser to demand a clear title before parting with his money as from any principle or rule of construction. Indeed, it is an admitted doc-

tract; it may even add incidents to it, if they are not inconsistent with its terms; but it cannot be set up to annul or defeat the provisions of a special contract. Coxe v. Heisley, 19 Pa. St. 243.

[19] 4 Kent, Com. 471.

[20] 2 Sugd. on Vend. 701.

[21] Wilson v. Wood, 2 Greene (N. J. Eq.) 216.

[22] Lewis v. Boskins, 27 Ark. 61; Haynes v. White, 55 Cal. 38; Clark v. Craft, 51 Ga. 368; Brown v. Gammon, 13 Me. 276; Luckett v. Williamson, 31 Mo. 54; Dodd v. Seymour, 21 Conn. 480; Morgan v. Smith, 11 Ill. 199.

[23] Everson v. Kirtland, 4 Paige (N. Y.) 638.

trine that the right to a clear and unimpaired title does not grow out of the agreement of the parties, but is a guaranteed legal right, and the purchaser may insist upon this irrespective of any agreements for covenants unless by an express stipulation of the contract such right has been waived.

Among the earlier decisions there are a number of authorities, emanating from courts of the highest standing, to the effect that a contract to give a good and sufficient warranty deed of the land sold is to be regarded as relating only to the instrument of conveyance and not to the title; that the words "good and sufficient" in such connection relate only to the validity of the deed and its efficacy to pass the title which the vendor has, and that they do not imply that the vendor's title is valid, or that it is free from incumbrances; that the covenant of warranty was provided for merely to guard against any defect of title, and that its insertion clearly shows that the agreement was so understood by the parties.[24]

It is to be observed, however, that even these decisions recognize the necessity of title in the vendor whenever the agreement contains a stipulation for title, and hold, generally, that in such cases the contract is not performed unless a marketable title to the land passes by the deed. The general principle to be collected from these decisions seems to be that, when the contract stipulates for a conveyance of land, or estate, or for title to it, performance can be made only by the conveyance of an unimpeachable title; and when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed as the contract describes, however defective the title may be.[25] But these decisions, either expressly or in effect, have all been generally overruled; and the later and better rule would seem to be that, when a man buys land and contracts for a conveyance in general terms, the presumption is that he expects title, and his vendor is under obligations to furnish him with a perfect title.[26] If the contract provides for a warranty deed the vendor is bound to make a marketable title to the land, and the purchaser will not be compelled to complete his purchase,

[24] See Tinney v. Ashley, 15 Pick. (Mass.) 546; Parker v. Parmlee, 20 Johns. (N. Y.) 130.

[25] Hill v. Hobart, 16 Me. 164; Aiken v. Sanford, 5 Mass. 294.

[26] Carpenter v. Bailey, 17 Wend. (N. Y.) 244.

upon receiving such warranty deed from the vendor, when it appears that the title is not clear or that the land is incumbered.[27]

It is also held that an agreement to convey with warranty contemplates a conveyance from the vendor himself and not from a third person, and that, under such an agreement, the vendee will not be compelled to accept a deed made by a third party who in fact possesses the title; but it seems that such an agreement is sufficiently performed where the vendor, having only an equitable title, procures the person having the legal title to convey to the vendee, and thereupon executes a deed with warranty himself.[28]

§ 420. Covenants limited to estate actually conveyed. No rule is better established or more generally recognized than that which provides that the estate granted by a deed is neither enlarged nor diminished by the covenants for title therein contained, whether express or implied.[29] Such covenants are but simple assurances of the title. If the grantee takes but a life estate, the covenants assure that estate;[30] if he takes the fee, but subject to an incumbrance thereon, the covenants of warranty of title, and even those against incumbrances, if such are inserted, will extend only to the estate actually conveyed, which is practically an equity of redemption.[31]

§ 421. Covenants running with the land. A covenant runs with the land when either the liability for its performance or the right to enforce it passes to the assignee of the land it-

[27] See Mead v. Fox, 6 Cush. (Mass.) 199; Stow v. Stevens, 7 Vt. 27; Little v. Paddleford, 13 N. H. 167; Story v. Conger, 36 N. Y. 673; Taft v. Kessel, 16 Wis. 273.

[28] Barnett v. Morrison, 2 Litt. (Ky.) 71.

[29] Lehndorf v. Cope, 122 Ill. 317.

[30] Lehndorf v. Cope, 122 Ill. 317.

[31] A deed for lots, after the description, contained the following clause: "subject to the following incumbrances on said described premises," describing them; after which followed full covenants of warranty of title, and that the premises conveyed were free and clear from all incumbrances, containing no exceptions. *Held*, that the covenants applied only to the estate conveyed, which was not the lots absolutely, but subject to the incumbrances, and that the real covenant was that, otherwise than subject to incumbrances named, the lots were free from all incumbrances, and the grantor would warrant and defend the title. Drury v. Holden, 121 Ill. 130.

self;[32] but in order that the covenant may run with the land, its performance or non-performance must affect the nature, quality or value of the property demised independently of collateral circumstances,[33] or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.[34] This latter is an essential element, hence, notwithstanding a wife may join in her husband's deed or a husband may join in a conveyance of his wife's separate property, yet the respective spouses, having no title or possession in their own right, will be held upon the covenants, if at all, only as for a personal undertaking with the immediate grantee. Such a covenant does not run with the land and cannot be taken advantage of by a subsequent grantee.[35]

As a rule, all covenants which relate to and are for its benefit run with the land, and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment.[36] Where, however, the covenant relates to matters collateral to the land, its obligation will be confined strictly to the original parties to the agreement,[37] the covenant in such case being personal. So, too, there is a wide difference between the transfer of the burden of a covenant running with the land and of the benefit of the covenant; or, in other

[32] Dorsey v. R. R. Co. 58 Ill. 65; Brown v. Staples, 28 Me. 497; Clarke v. Swift, 3 Met. (Mass.) 390.

[33] Norman v. Wells, 17 Wend. (N. Y.) 136.

[34] Wiggins v. R'y Co. 94 Ill. 83; Norcross v. James, 140 Mass. 188. When the relation of tenure is created by a grant, all the covenants of the grantee for himself and his assigns which affect the land granted will be a charge upon it and bind every one to whom it may subsequently come by assignment. Wiggins v. R'y Co. 94 Ill. 83.

[35] Myatt v. Coe, 152 N. Y. 427.

[36] Sterling Hydraulic Co. v. Williams, 66 Ill. 393. In several of the states it has been held that a covenant to erect and maintain a partition fence, where there is privity of estate existing between the covenantor and covenantee, or is created at the time of making the covenant, runs with the land, and is binding upon subsequent grantees. See Bronson v. Coffin, 108 Mass. 175; Hazlett v. Sinclair, 76 Ind. 488; Kellogg v. Robinson, 6 Vt. 276; Easter v. R. R. Co. 14 Ohio St. 48; St. Louis, etc. R. R. Co. v. Mitchell, 47 Ill. 165. A covenant not to establish another mill-site on the same stream has been held to have this effect. Norman v. Wells, 17 Wend. (N. Y.) 36. Or not to engage in offensive trades upon the premises. Barron v. Richard, 3 Edw. Ch. (N. Y.) 96.

[37] Gibson v. Holden, 115 Ill. 199; Parish v. Whitney, 3 Gray (Mass.) 516.

words, of the liability to fulfill the covenant and of the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and the covenantee at the time when the covenant was made.[38] This naturally follows from the principle that the obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate.

Where a covenant is not of such a nature that the law permits it to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of the parties.[39]

It is a further rule that covenants will run with incorporeal as well as corporeal hereditaments.[40]

The covenant of warranty is always held to be prospective, and to be unbroken until eviction. This covenant, therefore, always runs with the land for the benefit of any and all successive grantees.[41] The same is true of the covenant for quiet enjoyment; and while covenants for seizin and against incumbrances are generally held to be *in presenti,* and broken, if at all, at the time they are made, and hence becoming mere *choses in action* enforceable only by the original covenantee,[42] yet in some of the states it is held that they too run with the land so far as to permit an action to the particular successive grantee on whom the damage occasioned by their breach actually falls.[43]

In estates not of inheritance or less than the fee, all covenants which come within the general rules first mentioned are

[38] Cole v. Hughes, 54 N. Y. 444; Weld v. Nichols, 17 Pick. (Mass.) 543; and see Hurd v. Curtis, 19 Pick. (Mass.); Harsha v. Reid, 45 N. Y. 415.

[39] Gibson v. Holden, 115 Ill. 199.

[40] Fitch v. Johnson, 104 Ill. 111; Van Rensselaer v. Read, 26 N. Y. 558; Hazlett v. Sinclair, 76 Ind. 448; but see Mitchell v. Warner, 5 Conn. 497; Wheelock v. Thayer, 16 Pick. (Mass.) 68.

[41] Chase v. Weston, 12 N. H. 413; Mitchell v. Warner, 5 Conn. 497; Flaniken v. Neal, 67 Tex. 629; Montgomery v. Reed, 69 Me. 510; Wyman v. Ballard, 12 Mass. 306.

[42] Blondeau v. Sheridan, 81 Mo. 545; Davenport v. Davenport, 52 Mich. 587; Real v. Hollister, 20 Neb. 112.

[43] See Allen v. Kennedy, 91 Mo. 324; Cole v. Kimball, 52 Vt. 639; Knadler v. Sharp, 26 Iowa 232. In Massachusetts and Maine this is made so by statute. The matter

deemed to run with the land. Thus, a covenant to repair[44] is regarded as a continuing covenant.

422. Effect and extent of restrictions. Notwithstanding that the covenants are themselves general and unlimited, their effect and operation may be restrained by an agreement of the parties inserted in the deed, or by special covenants in respect to the land, estate or title.

It would seem, however, that a special exception or restriction annexed to one covenant will not have the effect to qualify the others;[45] and that it is only when the words of exception or qualification are not annexed to any one of the covenants, but are part of the description of the property granted, that they apply to all of the covenants alike.[46] As, where a covenant against incumbrances except a certain mortgage precedes a general covenant of warranty without exception or qualification, the mortgage, it is held, will not be excepted from such covenant of warranty.[47] So, also, if covenants of warranty are introduced, but with restrictive words confining their operation to the covenantor's own acts, and a general covenant for quiet enjoyment is also made with no qualifying words, the covenant for quiet enjoyment will not, it seems, be restrained by the words of restriction applied to the other covenants, for the reason that this covenant is distinct from the covenant of title, and a man may not choose to guaranty his title generally, and yet may readily undertake that the possession shall not be disturbed.[48]

Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.[49]

will receive further treatment in that part of the work relating to damages.

[44] Demarest v. Willard, 8 Cow. (N. Y.) 206.

[45] Eastabrook v. Smith, 6 Gray (Mass.) 572; Freeman v. Foster, 55 Me. 508.

[46] Freeman v. Foster, 55 Me. 508.

[47] Sumner v. Williams, 8 Mass. 202; but compare Drury v. Holden, 121 Ill. 130.

[48] This is the doctrine of the English cases (see 2 Sugd. on Vend. 281, and cases cited), and which has been approved by some American decisions. See Eastabrook v. Smith, 6 Gray (Mass.) 572. But in the United States the covenant of warranty and of quiet enjoyment are practically the same.

[49] Sumner v. Williams, 8 Mass. 202. But where the covenants are of divers natures and concern different things, restrictive words added to one will not control the

But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification. And as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant.

§ 423. **Conveyances by attorney.** It would seem to have been formerly held, where an attorney in fact was authorized to sell land and execute conveyance thereof, but no authority was given to bind the principal by covenants, that no covenants could be demanded by the purchaser. The theory upon which these cases proceeded was that a conveyance or assurance is valid and perfect without either warranty or personal covenants, and therefore they are not necessarily implied in an authority to convey; that such authority is to be strictly construed, and any act varying in substance from it is void.[50] But this doctrine has long since been denied; and, as the right of the purchaser to covenants of title from his grantor is now unquestioned, so the law will not permit this right to be defeated simply because the grantor has delegated to a third person a ministerial authority to consummate the contract.[51]

§ 424. **Covenant of seizin.** The first of the five covenants usually inserted in deeds of conveyance is that the grantor is well seized of the premises conveyed and has good right to convey same. This is called the covenant of seizin. It is a covenant *in presenti,* and broken, if at all, when the deed is delivered. Nothing arising after delivery can be assigned as a breach.[52] If the grantor is not well seized, or if he has not the power to convey at the time of delivery of the deed, an action at once accrues, and a recovery may be had.[53]

generality of the others, although they all relate to the same land.

[50] See Nixon v. Hyserott, 5 Johns. (N. Y.) 58; Mead v. Johnson, 3 Conn. 592.

[51] Ward v. Bartholomew, 6 Pick. (Mass.) 410; Bronson v. Coffin, 118 Mass. 161; Vanda v. Hopkins, 1 J. J. Marsh. (Ky.) 293.

[52] Jones v. Warner, 81 Ill. 343; Messer v. Oestreich, 52 Wis. 684.

[53] King v. Gilson, 32 Ill. 348.

The covenant of seizin extends to all titles existing in third persons which may defeat the estate granted by the covenantor, but not to a title set up by the grantee, the vendee being estopped from setting up a previously-acquired title to defeat his vendor.[54]

The exact scope of this covenant does not seem to be well defined in this country, nor is it permitted to have the same effect in all of the states. In Massachusetts, and the states which have followed the construction which there obtains, these covenants do not express or imply a warranty of any absolute title; they relate to the actual seizin of the grantor, and that he has such possession of the premises as that he may execute a deed thereof.[55] On the other hand, the expressions that the grantor is well seized of the land conveyed and has good right to convey, or those of similar import, are considered in many states as amounting to a covenant of title.[56]

§ 425. Covenant for quiet enjoyment. This covenant goes only to the possession and not to the title,[57] and does not extend so far as the covenant of warranty. It is broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession.[58] It requires no precise or technical language to raise it, and will be created by any words which amount to or import an agreement to that effect.[59] In its practical operation it is prospective, runs with the land, descends to heirs, and vests in assignees and purchasers.

[54] Furness v. Williams, 11 Ill. 229.

[55] Raymond v. Raymond, 10 Mass. 134; and see Backus v. McCoy, 3 Ohio 211; Boothby v. Hathaway, 20 Me. 255; Watts v. Parker, 27 Ill. 229.

[56] Richardson v. Dorr, 5 Vt. 21; Lockwood v. Sturdevant, 6 Conn. 385; Parker v. Brown, 15 N. H. 186. And see Rawle on Covts., § 45 *et seq.*, for a discussion of the subject.

[57] Beebe v. Swartwout, 3 Gilm. (Ill.) 162.

[58] This covenant was formerly held to embrace wrongful as well as lawful evictions by third persons. But it is now well settled that a covenant for title gives the grantee a claim against the grantor only where the former is disturbed by one having a good adverse claim unless tortious evictions are included by express words. This principle is founded upon the policy of preventing any connivance between the grantee and a stranger without title for the purpose of recovering damages from the grantor, and also upon the consideration that one wrongfully disturbed has a remedy against the wrong-doer.

[59] Midgett v. Brooks, 12 Ired. (N. C.) 145.

It is regarded as one of the five covenants to which a purchaser is entitled under a contract for a deed with covenants; and notwithstanding that the covenant of general warranty is in effect a covenant for quiet enjoyment, it is customary to specifically insert this covenant as well.

§ 426. **Covenant against incumbrances.** Among the "usual covenants" which a purchaser has a right to demand is that against incumbrances, or any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by conveyance. In its operation it is practically a covenant for indemnity. It is considered to be *in presenti,* and broken, if at all, as soon as made.[60]

A vendor who desires to avoid the effect of this covenant should, for his own protection, specially and expressly except from its operation all known incumbrances of every kind; for, by the ruling of recent decisions, an incumbrance is not only such matters as merely affect the title, but includes many things that affect only the physical condition of the property as well. The fact that such incumbrances are known to the vendee in no way affects the liability of the vendor or impairs the vendee's right to recover, the question of notice in such cases being immaterial.[61]

§ 427. **Further assurance.** In addition to the familiar covenants to which allusion has already been made there are others of primary importance to intending purchasers, and to which they are frequently entitled. The chief of these less known covenants is that called a covenant for further assurance, which relates both to the title of the vendor and to the instrument of conveyance, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter. It is less extensively used in the United States than any of the other covenants for title; but this would seem, says Mr. Rawle, "to be owing rather to custom and the inartificial character of early conveyances than to any

[60] For a further discussion of this subject with reference to breach and damages, see "Actions for Damages," *infra.*

[61] Hubbard v. Norton, 10 Conn. 431; Snyder v. Lane, 10 Ind. 424; Smith v. Lloyd, 29 Mich. 382; Worthington v. Curd, 22 Ark. 285; Ladd v. Noyes, 137 Mass. 151; Williamson v. Holt, 62 Mo. 405.

want of usefulness in the covenant itself or difficulty as to its application."[62]

The covenant is practically an undertaking on the part of the vendor to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require. In the interpretation of this covenant due regard must be had to the character of the estate conveyed—its quantity, quality and extent—and the covenants which accompany it. If these latter are general, with no limitations or restrictions, the purchaser has a right, under the covenant for further assurance, to require the conveyance of a paramount title or the removal of an outstanding incumbrance; but if the estate conveyed be limited and the expressed covenants are restrained to some particular interest or estate, the purchaser cannot by virtue of his covenant for further assurance require the conveyance to himself of any other or greater estate, or the removal of incumbrances not created by the vendor.[63] The utmost limits to which courts have gone has been to extend the operation of the covenant to the very estate or interest conveyed by the deed.[64]

The further assurance must in all cases be reasonable, and conform to the nature and purport of the original bargain.[65]

§ 428. **Covenant of non-claim.** It was formerly a custom to insert in deeds of limited warranty a clause, or, as it was sometimes called, a covenant, of "non-claim." This, in the original form, was inserted immediately after the *habendum*, without the usual words of covenant being prefixed, and purported to be a denial of any further rights in the grantor in relation to the property conveyed. It might be general, but was usually limited to the grantor or those claiming under him.[66] In practice the covenant of non-claim is now seldom

[62] Rawle on Covts., § 98.

[63] See Armstrong v. Darby, 26 Mo. 517.

[64] The covenants generally can only extend to the estate granted, and there must be something very peculiar in their terms to warrant such a construction of them as to enlarge the estate granted in the premises. Corbin v. Healy, 20 Pick. (Mass.) 514.

[65] Miller v. Parsons, 9 Johns. (N. Y.) 336.

[66] See Rawle on Covenants for Title, p. 223, 3d ed. The following was a common form of this covenant: "So that neither I, the said (grantor), nor my heirs or any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will by any way

employed, having been superseded by the grantor's personal covenant against his own acts.

The legal effect of the covenant of non-claim has not always received a uniform interpretation, and in an early case[67] was held to be a covenant real, which runs with the land and estops the grantor and his heirs to make any claim or set up any title thereto; and such would certainly be its effect in its present modernized character of special warranty. The volume of authority, however, does not sustain this doctrine where the covenant retains its original form, *i. e.*, a simple denial of further rights. In this shape it makes no assertion of title, and at best can only be considered as an engagement respecting future conduct. In legal effect it is not distinguishable from an ordinary quitclaim, of which it is indeed a form; and while it is operative to pass all present interest, and to that extent is binding upon the grantor and those in privity with him, yet, since it contains no warranty of title, it is insufficient to convey any after-acquired title, or to estop the grantor from the assertion of a title subsequently acquired, unless by so doing he is obliged to deny or contradict some fact in addition thereto alleged in his former conveyance.[68]

§ 429. Covenant of warranty. The last and most extensive of all the covenants is the covenant of general warranty. This covenant is prospective, and is understood to be broken only upon an eviction, or by something equivalent thereto.[69] It runs forever with the land into the hands of all those to whom it may subsequently come either by descent or purchase.[70] This is the most important of all the covenants that the purchaser can demand, and the one of all others that he should insist upon having.

§ 430. Continued—Extinguishment of the covenant. While a covenant of warranty runs forever with the land into the hands of all those to whom it may come either by purchase

or means have, claim or demand any right or title to the aforesaid premises, or any part or parcel thereof forever."

[67] Fairbanks v. Fairbanks, 7 Greenl. (Me.) 96.

[68] Partridge v. Patten, 33 Me. 483; Kimball v. Blaisdell, 5 N. H. 533; Blanchard v. Books, 12 Pick. (Mass.) 47; Dart v. Dart, 7 Conn. 250.

[69] Claycomb v. Munger, 51 Ill. 373; Caldwell v. Kirkpatrick, 6 Ala. 62; Reed v. Hatch, 55 N. H. 336.

[70] Brady v. Spurck, 27 Ill. 478.

or descent, yet where a grantor of land whose deed contained a covenant of warranty before any breach of his covenant becomes re-invested with the seizin which he conveyed, and which he covenanted to warrant and defend, his obligation in that regard becomes extinguished. The estate granted by him ceases upon the reconveyance, and the covenant attendant upon the estate, and which is only co-extensive with it, is extinguished when the estate ceases.[71]

§ 431. **Cancellation of corresponding covenants.** Where, after a conveyance with covenants, the same lands are reconveyed to the grantor by his grantee with like covenants, the law construes such covenants as mutually cancelling each other, so that no action can be maintained on them by either of the parties or their assignees.[72]

§ 432. **Implied covenants.** Implied covenants, or, as they are also termed, covenants in law, are those which the law implies or infers from the nature of the transaction, although not expressed by direct language in the instrument containing them. They are raised by the employment of certain words having a known legal operation in the creation of an estate, and are a secondary force, as it were, given by law, constituting an agreement on the part of the grantor to protect and preserve the estate so by those words already created. In their origin they are distinctly traceable to the feudal constitutions, and grew out of the reciprocal relations of the feudal lord and his tenant.[73] The covenant or promise was raised from the words of grant, the fact of feoffment carrying with it the correlative duty of protection, and this principle has been retained and forms the basis upon which implied covenants rest wherever they are permitted to obtain.

The strong tendency of modern legal policy has been to limit

[71] Brown v. Metz, 33 Ill. 339.

[72] As where A. conveys land to B. upon which there is an incumbrance, with covenants against incumbrances and warranty, and B. subsequently reconveys to A. with like covenants, the several conveyances between them will by operation of law cancel or extinguish the covenants in B.'s deed as to all incumbrances covered by A.'s deed to B., to avoid circuity of action. Silverman v. Loomis, 104 Ill. 137.

[73] "The lord was bound," observes Mr. Rawle, "to warrant or insure the fief against all persons whomsoever claiming by title, and in case of loss to replace it with another; and when later it became usual to authenticate the creation or transfer of estates by charters or deeds, a warranty was in the

and restrict the operation of covenants implied from the use of words of grant. In many states they have been expressly abrogated by statute,[74] and in the other states receive their main efficacy from statutory provisions. The employment in a deed of the words "grant, bargain and sell," as the equivalent of the ancient expression *"dedi, concessi, demisi,"* etc., have, by statute in the states which still recognize implied covenants, been declared to be an express covenant to the grantee that the grantor was seized of an indefeasible estate in fee-simple, free from incumbrances done or suffered from the grantor, and for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee may in any action assign breaches as if such covenants were expressly inserted.[75]

But while these words are permitted to exert a certain efficacy in the absence of other and more direct expressions, yet their employment will not create covenants against the manifest intention of the parties. The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants, and the use of almost any language from which it appears that the parties intended that these words should not have such an effect will destroy the force of the implied covenants.[76] Hence, it has been held that, where a deed contains an express covenant, the statutory covenants are not implied.

As previously remarked, however, the doctrine of the common law, that certain words in the conveyance of real property of themselves import and make a covenant in law, has been abrogated by statute in a number of states, and enactments have been had which declare that no covenant shall be implied in any conveyance of lands, whether such conveyance contain

case of a freehold implied from the word of feoffment, *dedi.* Rawle on Covts., § 270.

[74] Such is the case in New York, Michigan, Minnesota, Oregon, Wisconsin and Wyoming.

[75] A substantial transcript of the statutes in force in Illinois, Pennsylvania, Arkansas, Alabama, California, Mississippi, Missouri and Texas. In Montana, Nevada, Dakota and New Mexico these words are permitted by statute to imply covenants of seizin and against incumbrances.

[76] Finley v. Steele, 23 Ill. 56; Stewart v. Anderson, 10 Ala. 504; Winston v. Vaughan, 22 Ark. 72; Weems v. McCaughan, 7 Smedes & M. (Pa.) 427.

special covenants or not. It is believed this view is supported by the sounder reason, and that in time it will receive universal recognition. A vendee, when he purchases, may insist on the general covenants and such special covenants as will secure to him a perfect indemnity for any loss or injury he may sustain by reason of an intrusion or eviction, and if he neglects so to do he should not be heard to complain.

§ 433. **Statutory deeds.** An attempt has been made in many states to simplify the forms of conveyancing by statutory enactments prescribing models or precedents for the ordinary deeds in common use and declaring their effect. The radical difference between these forms and those derived from the common law lies in the fact that they are entirely without *habendum,* and that the force and effect of the covenants, when the deed is intended to carry covenants, has been transferred to and merged into the operative words of grant.[77] These words are usually "convey and warrant," and in legal effect they imply that the deed shall be deemed and held to be a conveyance in fee-simple to the grantee, his heirs and assigns, with covenants from the grantor for himself and his heirs that he is lawfully seized of the property, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims.[78] In a few states the spirit of "reform" has evidently clouded the judgment of the legislators, and the desire to "simplify" has cut down the verbiage to the fewest words possible to effect a conveyance. In these forms there is no *habendum* and no attempt at express covenants. The operative word of conveyance is "grant," which is held to have effect as a covenant against the grantor's own acts.[79]

Statutory deeds of the latter class are substantially the same as common-law deeds with implied covenants, the general effect of the words "grant, bargain and sell" being to raise an implied covenant against the acts of the grantor unless restrained by special statute or a general statute abrogating all

[77] In some respects this is a return to the medieval system of implied warranty as discussed in the preceding paragraph.

[78] A substantial transcript of the statute of Illinois, Indiana, Michigan, Mississippi and Wisconsin.

[79] This form is adopted in California, Dakota, Maryland and Texas.

implied covenants in conveyances. Deeds of the former class, made in conformity to the statute, have all the force and effect of the special covenants that are usually contained in the common-law deeds of conveyance. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part equally as though they were written therein.[80]

§ 434. **Where wife refuses to join.** In the absence of an express stipulation providing for a release of dower it would seem that a vendor who has covenanted to convey by "a good and sufficient deed of general warranty" is regarded as having fully performed his part of the agreement if he tenders a deed executed by himself alone, and containing the covenants stipulated for.[81] Such a covenant to convey amounts to nothing more, it is said, than an engagement that it shall bar the covenantor and his heirs from ever claiming the land, and that he and his heirs shall ever undertake to defend it when assailed by paramount title.[82] Should the wife of the grantor in the deed containing such a covenant, but whose right of dower was not released thereby, become a widow and claim and recover her dower in a mode by which the grantee might be injured, he would be able to obtain recompense on the covenant in his deed.[83]

The courts announcing the foregoing doctrine proceed upon the theory that a covenant of general warranty does not of itself include a covenant against incumbrances, and that even if a contract to convey with warranty can be construed into a contract to make a deed free from incumbrances, yet that a possibility of dower is not, within the sense of such a covenant, an incumbrance.[84]

§ 435. **Value of covenants.** Mr. Preston, an English writer of eminence, seems to think that purchasers in general attach more value to covenants for title than they are really worth, and that considering the property of parties, the chances of eventual insolvency, etc., covenants rarely produce the benefit which is expected from them.[85] He further observes that, when

[80] Carver v. Louthain, 38 Ind. 530.

[81] Bostwick v. Williams, 36 Ill. 65.

[82] Bostwick v. Williams, 36 Ill. 65.

[83] Bostwick v. Williams, 36 Ill. 65.

[84] See Powell v. Monson, etc. Co., 3 Mason (C. Ct.) 355.

[85] 3 Prest. on Abstracts, 57.

the property is subdivided by sales, it seems to follow from a maxim of law that the purchasers lose the benefit of former covenants, on the ground that the remedy cannot be apportioned, or, in more correct terms, the covenantor cannot be subjected to several actions. With respect to the latter observation, however, the rule now seems to be settled that where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach on each separate parcel *pro rata*,[86] and while it is true that the financial responsibility of covenantors is liable to be rendered valueless by subsequent insolvency, yet this is one of the risks which men are necessarily obliged to assume in all transactions involving personal credit and financial reliance.

Aside from their financial features as guaranties of indemnity, covenants have many other excellent attributes which render them desirable to the purchaser and which give to them an actual value. They act as estoppels and permit the subsequent inurement of title; they are also *prima facie* evidence of legal good faith in real estate transactions, often affording protection against latent equities; and in examinations of title a long series of warranty deeds tends to give a stability to the title that no other agency can produce. A chain of title composed mainly of quitclaims or deeds with limited covenants carries suspicion on its face, and under the rulings of some courts is a direct notification to the purchaser that his title is doubtful, and that in accepting the same he assumes the risk of having it defeated by some existing but latent equity. For this reason, then, if for no other, should a purchaser insist upon the assurance of his title by proper covenants; and notwithstanding the fact that his covenantor is pecuniarily unable to respond in damages for any breach, the covenants themselves may be a tower of defense in case the title should be subsequently assailed.

§ 436. **Defective covenants—Operation and effect.** The introduction of labor-saving blanks has been a prolific source of error in the draughting of conveyances. Not only have they served to beget habits of carelessness and inattention in regular practitioners, but by furnishing in an abstract form the technical knowledge requisite to the draughting of instru-

[86] See Astor v. Miller, 2 Paige (N. Y.) 68.

ments, the art of conveyancing has become debased, and the office of the conveyancer has lost its dignity in the frequent usurpations to which it has been subjected. Ignorant officials, as well as ambitious but economical individuals, each in turn assume the duties of the conveyancer, and, with the aid of the accommodating blank, affect to perform the functions of his office. As a natural result, we frequently meet with many atrocious examples of conveyancing, and courts are often called upon to interpret the efforts or construe the inartificial expressions of the unskilled draughtsman. The very liberal construction now awarded deeds and other instruments, as well as the operation of statutes, which in a large measure have destroyed the effect of common-law rules, serves in some degree to counteract the errors, omissions and defects of the amateur conveyancer; yet such is the ignorance prevailing among the classes named of the nature and effect of the operative parts of deeds, that parties are frequently surprised into contracts they have not made and never intended. Particularly is this true in respect to the expressed covenants, the technical nature of which is but slightly understood by the masses, and vital defects are more frequently met with in these clauses than in any other part of the deed. The printed covenant clause ordinarily commences somewhat as follows: "And the said ———, for ——— heirs, etc., does covenant," etc. Through ignorance or carelessness, the draughtsman sometimes neglects to fill either of these blank spaces, the first of which is intended for the names of the covenanting parties, and the second for personal pronouns indicative of the same. The effect of an omission to fill these blanks is to render the entire clause nugatory, for where these spaces are not filled by the insertion of any names, the inference naturally arises that no such covenant was intended to be made; nor can the context, by construction, supply the omission.[87] This is, however, an extreme case, for the use of the first space is so obvious that few persons of ordinary comprehension will mistake its purport; but the rock on which the amateur conveyancer usually splits is the second space. This, when properly filled, contains two pronouns, as "himself, his," or, "themselves, their;" but the draughtsman, misled, perhaps, by the context, and of course ignorant of the legal effect of the expression,

[87] Day v. Brown, 2 Ohio 345.

usually inserts only the word "his" or "their," as the case may be, and in this condition the deed is delivered and accepted.

The frequency with which this error is found justifies an inquiry into its legal effect. In this instance, not only is there no direct covenant on the part of the granting party, but there is an unequivocal covenant for the heirs of such party; and though courts are ever inclined to construe evident errors and omissions of the clerk liberally, and to give effect to the instrument according to the manifest intention of the parties,[88] yet the principle is well settled that the liability of parties under a contract must depend upon the terms they have seen fit to use, and not upon those they might have used;[89] while mistakes of law never afford ground for equitable relief.[90]

Now, in the example under consideration, there is neither uncertainty nor manifest error, and the legal effect of a covenant of this character is, not that the grantors will defend the title, but that the same shall be defended by their heirs, etc. It does not give a right of action against the grantors on the loss of title, but provides a remedy against their heirs and legal representatives; it exempts the grantors from personal liability, but binds their descendants in respect of the estate that may be cast upon them. It is not like a covenant that a person who is not a party to the deed shall warrant and defend the title, for in such case, upon the eviction of the grantee, and the failure of such third person to comply with the terms of the covenant, an action might be maintained against the grantors, on the familiar principle that what a party undertakes shall be performed by another he must himself perform on the default of that other. In this case the covenant is that the act shall be performed by parties who can have no legal existence during the life of the grantors, and until their decease there is no person living who can be called upon to avouch the title.[91]

Such are the views expressed by the supreme court of Illinois, and they would seem to be founded in reason and upon

[88] Callins v. Lavalle, 44 Vt. 230; Churchill v. Reamer, 8 Bush (Ky.) 256; Peckham v. Haddock, 36 Ill. 38.

[89] Day v. Brown, 2 Ohio 345; Bobb v. Bancroft, 13 Kan. 123; Walker v. Tucker, 70 Ill. 527.

[90] Hayes v. Stiger, 29 N. J. Eq. 196; Morris v. Hogle, 37 Ill. 150.

[91] Traynor v. Palmer, 86 Ill. 477; Ruffner v. McConnell, 14 Ill. 168.

sound principle, and in states where by statute no covenants can be implied in deeds or other instruments the conclusions above stated would appear to be irresistible; yet in Wisconsin, where a statute similar to that just mentioned has long been in force, and where this question has twice been presented, a result diametrically opposed to that above given has been reached. In the first case[92] it was held that although the covenant might be defective in law, yet equity would always supply the omission in conformity with the evident intention of the grantor; while in the second[93] the covenant was sustained as that of the grantor, notwithstanding the omission. In neither case, however, do the decisions appear to have been reached by much reasoning, nor do the learned judges fortify the same with any citation of authority. The reason assigned in the first instance is obviously defective and incorrect, for the "evident intention of the grantor" cannot be better determined than from the language of the conveyance;[94] and where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.[95] Words and phrases are always to be taken in their commonly accepted sense, unless a different intent plainly appears; and where words have a well-defined, specific meaning, importing intention, they cannot be altered, limited or enlarged in their meaning by implication or extrinsic evidence.[96]

It is a rule of universal recognition that when parties deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties, its extent and manner, is thereby expressed. To add to it by implication would be to vary its terms,[97] and though contracts must always receive a liberal interpretation, yet courts are powerless to disregard the terms of a contract plainly expressed,

[92] Stanley v. Goodrich, 18 Wis. 505.

[93] Hilmert v. Christian, 29 Wis. 104.

[94] German Ins. Bank v. Nunes, 80 Ky. 334.

[95] Walker v. Tucker, 70 Ill. 527; Callender v. Dinsmore, 55 N. Y. 200; Fire Ins. Co. v. Doll, 35 Md. 89.

[96] Galena Ins. Co. v. Kupfer, 28 Ill. 332.

[97] Merchants' Ins. Co. v. Morrison, 62 Ill. 242.

and their only duty is to enforce the same according to the intent of the parties as shown by the language used.[98]

The omission, it is true, might readily be inferred with reference to the established custom of drawing conveyances and the insertion of covenants; but the rule still remains that where parties have settled the terms and conditions of a contract by agreement, which has been reduced to writing, they must be governed by its provisions, and will be concluded by it regardless of any usage or custom.[99]

A different case is presented by an imperfectly-filled blank, but which still indicates an intention. Thus, a covenant by grantors "for them, ———— heirs," etc., has been construed "themselves, their heirs," etc., and held to be the covenant of the grantors;[1] but in this instance the intention is clearly manifest and the error of the clerk very palpable. The question of construction in such a case is comparatively simple, and the imperfect words show the intention of the grantor. The neglect to insert the word "their" was also immaterial, as would have been the word "heirs," for the legal effect of the covenant would have been the same if all reference to the heirs, executors and administrators had been omitted.[2]

§ 437. **Quitclaims.** A quitclaim deed will as effectually pass the title and covenants running with the land as a deed of bargain and sale if no words restrict its meaning;[3] and, where such deed contains a covenant for further assurance, will convey a subsequently-acquired title as well as a covenant of warranty.[4] But where one accepts a deed without covenants for title he takes the hazard of the same, and, in the absence of fraud, cannot recover back the purchase money on failure of title.[5]

The operative words usually employed in deeds of the character under consideration are "convey and quitclaim;" but it has been held that a deed which "grants, bargains and sells all of the right, title and interest" of the grantor is merely a

[98] Coey v. Lehman, 79 Ill. 173; Kimball v. Custer, 73 Ill. 389.

[99] Corbet v. Underwood, 83 Ill. 324; Kimball v. Custer, 73 Ill. 389; Moran v. Prather, 23 Wall. 492; Callender v. Dinsmore, 55 N. Y. 200.

[1] Baker v. Hunt, 40 Ill. 264.

[2] Hall v. Bumstead, 20 Pick. 2; Bell v. Boston, 101 Mass. 506.

[3] Morgan v. Clayton, 61 Ill. 35; Saunders v. Flaniken, 77 Tex. 662.

[4] Bennett v. Waller, 23 Ill. 97.

[5] Botsford v. Wilson, 75 Ill. 132.

quitclaim conveyance, and inoperative to convey an after-acquired title.[6] Where implied covenants are permitted to obtain, and where such covenants are held to be raised by the employment of the words "grant, bargain and sell," it may be a question whether this rule would hold good, notwithstanding that the estate purported to be conveyed is only the "right, title and interest" of the grantor.

It is a most unusual proceeding, however, to insert covenants of any kind in a mere quitclaim or a conveyance of the grantor's "right, title and interest" in the land described. Indeed, the primary object of a conveyance of this character is a simple transfer of whatever right may exist in the vendor, unaccompanied by any assurances or agreements with respect to such right, the vendee taking such naked interest at his own risk. But occasionally deeds of this kind are made with covenants and a question is thereby presented with respect to the legal import of such covenants. The general opinion seems to be that they are limited by the subject matter of the conveyance, that is, the grantor's naked interest, and hence, are not broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance.[7]

[6] Butcher v. Rogers, 60 Me. 138. This rule is not founded in legal reason as the grantor's interest is all that is conveyed in any deed, yet for many years courts seem to have made a distinction between a conveyance of "land" and of the grantor's "interest" in land, and doubtless the distinction will continue to be observed despite its highly unscientific character.

[7] Reynolds v. Shaver, 59 Ark. 299.

CHAPTER XVII.

CONDITIONS, LIMITATIONS AND RESTRICTIONS.

§ 438. General principles.
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§ 438. General principles. It is now well settled that every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only limitation on this right is that it shall be exercised reasonably with due regard to public policy, and without creating any unlawful restraint of trade; and, keeping within the limitation, there is no longer room for a doubt that in whatever shape such restraint is placed on land by the terms of the grant—whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement—it is binding as between the grantor and the immediate grantee, and can be enforced against him both at law and in equity.[1]

[1] Whitney v. Union R'y Co., 11 bree, 103 Mass. 372; Linzie v. Gray (Mass.) 359; Gannett v. Al- Mixer, 101 Mass. 512; Harriman v.

A more difficult question is presented when we come to consider to what extent and in what cases such stipulations are binding, if at all, on those who take the estate under the grantee, either directly or by a derivative title. The better opinion, however, seems to be that such agreements are valid and capable of enforcement in equity against all who acquire the title with notice of the restriction. This opinion seems to rest on the principle that as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of the existing rights of another, is liable to the same extent and in the same manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform.[2] It seems, also, that such agreements have been upheld in equity as against subsequent purchasers with notice, on the ground that such stipulations create an easement or privilege in the land conveyed for the use and benefit of the grantor and those who might afterwards claim under him as owners of the adjacent land of which the land granted originally formed a part.[3]

In neither of the foregoing cases are the agreements regarded as real covenants running with land, nor is it contended that they are of such a nature as to create a technical qualification of the title conveyed by the deed. Indeed, they do not affect the title, but only the mode of use. Strictly speaking, they amount to no more than personal contracts, and at law would be binding only on the original parties. But in equity those claiming title under them may resort to the whole instrument, including the covenants and agreements in gross, for the purpose of ascertaining the nature of the right intended to be conveyed; and, when ascertained, the court will enforce in favor of such persons that use or mode of enjoyment which the grantor has seen fit to impress upon it, and thus the effect of a grant may be given to that which is in the form of an agreement, binding at law only between the original parties.[4]

Park, 55 N. H. 471; Emerson v. Mooney, 50 N. H. 315; Plumb v. Tubbs, 41 N. Y. 442; O'Brien v. Wetherill, 14 Kan. 616; Collins v. Marcy, 25 Conn. 242; Stines v. Dorman, 25 Ohio St. 580.

[2] Whitney v. Union R'y Co., 11 Gray (Mass.) 359; Schwoerer v. Market Association, 99 Mass. 298.

[3] Parker v. Nightingale, 6 Allen (Mass.) 345.

[4] Schwoerer v. Market Ass'n, 99 Mass. 298.

It will be seen, therefore, that the precise form or nature of the covenant or agreement is immaterial; neither is it essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice, not merely because he stands as assignee of the party who made the agreement, but because he has taken such estate in full view of an agreement concerning it which he cannot equitably refuse to perform; or, on the other hand, in order to carry out the plain intent of the original parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or easement appurtenant to the remaining land belonging to the grantor at the time of the grant, and arising out of and attached to the land, part of the original parcel, conveyed to the grantee.[5]

§ 439. **Conditions.** Probably the most familiar and widely-employed method of imposing burdens on the grantee, or of subjecting the estate conveyed to some particular restriction or limitation, or of confining the enjoyment of the granted premises to some specific use, is by the insertion in the deed of a recital technically known as a condition, the effect of which, in case of breach, may be to modify or defeat the grant with which it is connected.[6]

[5] Whitney v. Union R'y Co., 11 Gray (Mass.) 359.

[6] Conditional estates are an inheritance from the feudal law, and originally grew out of the conditions upon which fiefs were granted. They imply a holding by tenure, and for this reason, if none other, are not in accord with the genius of our institutions, which recognizes no superior lord holding reversions or other paramount rights, and are fundamentally opposed to the principles of ownership under allodial titles. Forfeiture, which is the inseparable legal incident to such estates, is not compatible with the modern American idea of full and complete ownership. It originated and was developed under a system radically different from that which obtains in the United States, and which recognized as the highest type of property in the subject only a leasehold interest; and although this interest might continue for an indefinite period of time and was dignified with the name of freehold, it was still dependent on conditions, and the reversion could never be lost to the ultimate lord.

The principle of forfeiture came to us with other inapt and inconsistent doctrines on the separation of the colonies, and has been retained through a series of years mainly because of a slavish and, in many cases, blind adherence to the formidable array of English

But what will or will not constitute a condition is often a matter of nice discrimination and construction, and, as great property interests frequently depend upon the value to be given to stipulations and recitals, it is to be regretted that a full review of the adjudicated cases leaves the matter, if not in doubt, at least in such a state that but few rules can be deduced for the benefit of the practitioner. In theory, perhaps, there should be little difficulty in properly construing recitals of the character under consideration, if technical words and forms of expression were always accorded the meaning and signification which long usage and judicial interpretation have given them, or if the legal consequences which flow from the employment of such terms could always be determined by arbitrary rules. But in practice the questions thus raised are often difficult and perplexing. No standard is available to determine their value, for the modern rules of construction have materially changed the effect of technical words, while special clauses indicative of a particular intent must give way to the general intent as developed by the entire instrument, read in the light of extrinsic facts; and thus conditions in form may be construed as covenants in effect, or as simple stipulations operating neither as conditions or covenants. The object of this chapter, therefore, will be briefly to consider the

precedents which American jurists have falsely endeavored to apply to our system of titles and estates. But the original and inherent principles of allodial ownership, when unaffected by the doctrines of the common law, afford no room for reversionary rights in one who has parted with his title by an absolute conveyance; and the doctrine of conditional estates, so far as it is administered in this country, forms an anomalous proceeding, unsupported by principle and authorized by very doubtful precedent.

That these sentiments are not shared alone by the writer is evident from the uniform tendency of modern judicial decision; the great change, which, particularly in the west, has been wrought in the construction of mortgages; and the operation and effect now accorded to technical recitals importing conditions in deeds of realty. From every side come indications of a reversal or denial of the common-law canons of forfeiture; and as the bench and the ranks of the elementary writers continue to be recruited from men imbued with American ideas of American law, and freed from the influence of the harsh and inappropriate rules of our English inheritance, forfeiture of a fee-simple estate once vested will become an impossibility, and the more just and enlightened rule of compensation or performance will provide an adequate remedy for all breaches of covenants and conditions.

operation of special conditions and stipulations in conveyances by deed, and the effect they may have upon the estate conveyed.

§ 440. **Continued—Definition and classification.** Conditions are classed as precedent and subsequent. Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged; they admit of no latitude, and must be strictly, literally and punctually performed.[7] Ordinarily no questions can arise as to their construction, save only whether they should not be construed as subsequent rather than precedent, for no precise language is necessary to constitute them when the intent is fully disclosed; and whether a condition is precedent or subsequent depends upon the intention of the parties as shown by a proper construction of the whole instrument.[8] Conditions subsequent indicate something to be performed after the estate has vested, the continuance of the estate depending upon its performance. It is this class of conditions which has given rise to most of the litigation on the subject as well as to the many embarrassing questions of construction.

The legal effect of a condition precedent is to withhold the estate until performance; the legal effect of a condition subsequent is to defeat the estate already vested upon a breach or non-performance. But although the several effects of these two classes are so divergent, it is not always easy to determine whether the condition is precedent or subsequent from the language employed. If, however, the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent.[9]

Subsequent conditions, as they tend to defeat estates, are

[7] Van Horne v. Dorrance, 2 Dall. (U. S.) 317; Moakley v. Riggs, 19 Johns. 71; Bostwick v. Hess, 80 Ill. 138; Taylor v. Bullen, 6 Cow. (N. Y.) 627.

[8] Rogan v. Walker, 1 Wis. 527; Sheppard v. Thomas, 26 Ark. 617; Underhill v. Saratoga, 20 Barb. 455; Finlay v. King's Lessee, 3 Pet. (U. S.) 346; Gardiner v. Corson, 15 Mass. 500.

[9] Underhill v. Saratoga, 20 Barb.

not favored by the courts,[10] and are always to be strictly construed as against the grantor,[11] and with liberal intendments as regards the grantee.[12] Forfeitures are said to be odious;[13] and unless the conditions are clearly and minutely expressed,[14] the courts will, as a rule, eagerly lay hold of any plausible feature to sustain the grant,[15] and for this purpose will always, when the import of the language used is doubtful, incline to interpret the recitals as covenants rather than conditions.[16]

Where a conveyance of land in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor. The condition has no effect to limit the title until it becomes operative to defeat it; and the possibility of reverter, which is all that remains in the grantor, is not an estate in the land.[17] The estate held by the grantee will, of course, remain defeasible until the condi-

455; Nicoll v. R. Co., 2 Kernan (N. Y. 121; Finlay v. King's Lessee, 3 Pet. (U. S.) 374.

[10] Palmer v. Ford, 70 Ill. 196; Warner v. Bennett, 31 Conn. 478; Craig v. Wells, 11 N. Y. 315; Paden v. R. R. Co., 73 Iowa 328; Curtis v. Board of Education, 43 Kan. 138; Higbee v. Rodeman, 129 Ind. 244; compare Mott v. Danville Seminary, 129 Ill. 403.

[11] Gadberry v. Sheppard, 27 Miss. 203; Hoyt v. Kimball, 49 N. H. 322; Moore v. Pitts, 53 N. Y. 85; Duryea v. Mayor, 62 N. Y. 592.

[12] Palmer v. Ford, 70 Ill. 369; Woodworth v. Payne, 74 N. Y. 196; Glenn v. Davis, 35 Md. 208; Merrifield v. Cobleigh, 4 Cush. (Mass.) 184; McQuesten v. Morgan, 34 N. H. 400. It is upon this principle that it has been held that where a condition applies in terms to the grantee, without mention of his heirs, etc., the condition cannot be broken after the death of the grantee. So, also, although the heirs, etc., are named, yet if assigns are not, it will not be broken by any act of an assignee. Emerson v. Simpson, 43 N. H. 475.

[13] Warner v. Bennett, 31 Conn. 478; Ins. Co. v. Pierce, 75 Ill. 427; Rowell v. Jewett, 71 Me. 408.

[14] Woodworth v. Payne, 74 N. Y. 196. The extent and meaning of a condition and the fact of a breach are questions *strictissima juris;* and a plaintiff, to defeat an estate of his own creation, must bring the defendant clearly within its letter. Lynde v. Hough, 27 Barb. (N. Y.) 415; Hunt v. Beeson, 18 Ind. 380; Taylor v. Sutton, 15 Ga. 103; Page v. Palmer, 48 N. H. 385; Weir v. Simmons, 55 Wis. 637.

[15] Hammond v. R. Co., 15 S. C. 10; Jackson v. Harrison, 17 John. 66.

[16] Board of Education v. Trustees, 63 Ill. 204; Hoyt v. Kimball, 49 N. H. 322; Wheeler v. Dascomb, 3 Cush. (Mass.) 285; Thornton v. Trammell, 39 Ga. 202; Packard v. Ames, 16 Gray (Mass.) 327.

[17] Shattuck v. Hastings, 99 Mass. 23; Vail v. R. R. Co., 106 N. Y. 283; Spect v. Gregg, 51 Cal. 198; Alemany v. Daly, 36 Cal. 90.

tion be performed, destroyed or barred by the statute of limitations or by estoppel.[18]

Conditions are further classed as expressed and implied, the former being those which are declared in express terms in the deed creating the estate, and the latter those which the law implies, either from their being always understood to be annexed to certain estates or as annexed to estates held under certain circumstances.

§ 441. **Continued—Operation and effect.** A covenant, condition or stipulation inserted in a deed delivered to and accepted by the grantee, will bind him to a due observance of the covenant or performance of the condition, whenever the same directly relates to the land embraced in the conveyance,[19] or is connected with such lands and those immediately adjoining.[20] Such agreements may be collateral to the conveyance, but they must relate to the premises whose title is transferred, and an agreement touching alien lands will never be imputed to the grantee. The grantor may impose a restriction, in the nature of a servitude or easement, upon the land which he sells for the benefit of the land he retains; and if that servitude is imposed on the heirs and assigns of the grantee, and in favor of the heirs and assigns of the grantor, it will be binding upon, and may be enforced against, any subsequent purchaser of the property with notice.[21]

So also the grantor may impose a servitude or condition upon the land which he retains and in favor of the land he sells, but the principle is the same; and when an owner subjects his lands to any servitude and transmits them to others charged with the same, any one taking title to such lands with notice of the conditions or restrictions affecting their use or the method of their enjoyment takes subject to the burdens thus imposed, and, as standing in the place of his grantor, is

[18] M. & C. R. R. Co. v. Neighbors, 51 Miss. 412; Osgood v. Abbott, 58 Me. 73; Hubbard v. Hubbard, 97 Mass. 188; Guild v. Richards, 16 Gray (Mass.) 309; Chalker v. Chalker, 1 Conn. 79; Willard v. Henry, 2 N. H. 120.

[19] Kimpton v. Walker, 9 Vt. 191; Clark v. Martin, 49 Pa. St. 289; Stines v. Dorman, 25 Ohio St. 580; Dismukes v. Halpern, 47 Ark. 317.

[20] Burbank v. Pillsbury, 48 N. H. 475; Bronson v. Coffin, 108 Mass. 175; Hazlett v. Sinclair, 76 Ind. 488; Walsh v. Barton, 24 Ohio St. 48; Kellogg v. Robinson, 6 Vt. 276.

[21] Whitney v. R. R. Co., 11 Gray (Mass.) 359; Clark v. Martin, 49

bound to do or forbear from doing whatever his grantor should do or should not do.[22]

§ 442. **Construction of conditions.** In the construction of conditions, limitations and restrictions there cannot be said to be any technical rule, but courts are bound in every case to ascertain the intent of the parties and give effect to the instrument accordingly.[23] A special intent will not usually prevail over a general intent; but, it seems, whenever limitations, carefully stated, and a general expression are applied in the same instrument to the same subject-matter, the former are made the superior and controlling words of the deed.[24]

§ 443. **Continued—Conditions in avoidance.** The rule is well established that a condition to avoid an estate must be taken strictly. It cannot be extended beyond its express terms, and a party who insists upon the forfeiture of an estate under a condition of his own creation must bring himself clearly within the letter.[25] No act not embraced within the language can be said to be within the spirit of the condition, nor will such act be substituted for the act prohibited by its terms.[26] In every case the language should be strictly construed, and the limitation or condition have only a literal interpretation.

§ 444. **Continued—When construed as covenants.** The tendency of modern times is to relax the stricter rules which raise and govern conditions and to construe recitals which limit or restrict the use of property as covenants rather than conditions. Covenants, like conditions, do not depend upon

Pa. St. 289; Thurston v. Minke, 32 Md. 487.

[22] Trustees v. Lynch, 70 N. Y. 440.

[23] Hoyt v. Kimball, 49 N. H. 322; Packard v. Ames, 16 Gray (Mass.) 327.

[24] Bailey v. Close, 37 Conn. 408.

[25] Jackson v. Silvernail, 15 Johns. (N. Y.) 278; Snyder v. Hough, 27 Barb. (N. Y.) 415; Emerson v. Simpson, 43 N. H. 473; Voris v. Renshaw, 49 Ill. 425.

[26] Where the grantor in a deed annexed to the grant a condition that the grantee should not convey the property except by lease for a term of years prior to a certain day named therein, and the grantee afterwards and within the limited period executed to a party a lease of the premises for ninety-nine years, and also, at the same time, gave to him a bond for the conveyance of the property in fee after the expiration of the limitation, and received from the purchaser the price therefor, *held*, that these acts of the grantee were not prohibited by the condition, and hence worked no forfeiture of the estate. Voris v. Renshaw, 49 Ill. 425.

precise or technical words;[27] and whatever shows the intent of the parties to bind themselves to the performance of a stipulation may be deemed a covenant without regard to the form of expression.[28] A covenant or condition may be created by the same words.[29]

It is a well-established rule that the recitals in a deed will never be permitted to control the operation of the instrument if the plain intent would be thereby defeated; and, further, that courts are bound in every case to ascertain the intent of an instrument and give it effect accordingly. Hence if a condition is plainly manifest it must prevail; but the authorities are united in declaring that a recital only operates as a condition when it is apparent from the whole scope of the instrument that it was intended to so operate. But if it be doubtful whether a clause in a deed be a covenant or a condition, courts will incline against the latter construction;[30] and if the language employed is not in form either a covenant or condition, the clause will be construed as a covenant rather than a condition.

A conditional stipulation expressing an agreement, as "it is expressly agreed and understood," will usually, although operating as a restriction, produce also a covenant personal to the grantee if there be no clause uniting his heirs,[31] or running with the land and binding the successors, according to the spirit of the agreement.[32] Notwithstanding that the restriction may be in the most positive and emphatic terms, if it clearly imports an agreement and does not provide for reentry or forfeiture, it is always to be construed as a covenant

[27] Newcomb v. Presbrey, 8 Met. (Mass.) 406; Davis v. Lyman, 6 Conn. 252; Meyers v. Burns, 33 Barb. (N. Y.) 401.

[28] Taylor v. Preston, 79 Pa. St. 436; Hallet v. Wylie, 3 Johns. (N. Y.) 44; Bull v. Fallett, 5 Cow. (N. Y.) 170. But where a covenant in form is followed by a clause of forfeiture it will be construed a condition. Moore v. Pitts, 53 N. Y. 85; Gray v. Blanchard, 8 Pick. (Mass.) 284.

[29] Hartung v. Witte, 18 N. W. Rep. 175; Parmelee v. R'y Co., 2 Seld. (N. Y.) 80; Chapin v. Harris, 8 Allen (Mass.) 594.

[30] Gallagher v. Herbert, 117 Ill. 160; Hoyt v. Kimball, 49 N. H. 322; Thornton v. Trammell, 39 Ga. 202.

[31] Skinner v. Shepard, 130 Mass. 180; Norris v. Laberee, 58 Me. 260; Emerson v. Simpson, 43 N. H. 475.

[32] St. Andrew's Church Appeal, 67 Pa. St. 512; Trustees, etc. v. Cowen, 4 Paige, Ch. (N. Y.) 510.

and never as a condition.[33] On the other hand, although the stipulation is a covenant in form, yet if followed by a clause of forfeiture it will be construed a condition.[34]

§ 445. Creation of conditions. A condition must be distinguished from a merely restrictive stipulation; yet, as has been said, this is not always an easy matter to do. The recital may in effect produce a condition or a covenant, or it may amount to no more than a prohibitory stipulation, which, although partaking somewhat of the nature of each of the two former classes, operates in a manner different from either.[35]

By long and almost immemorial usage and the repeated adjudications of courts, a condition may be raised by the employment of that term, the usual formula being: "provided always, and this deed is upon the express condition."[36] These terms, "provided always," "upon the express condition," etc., have frequently been held to create an estate upon condition,[37] unless the context or something in other parts of the deed tends to negative this idea. So, also, the words "if," "if it shall so happen," or other equivalent expressions, when relating to conditions depending on contingencies, have been taken and held to operate in the same manner. These expressions are given as examples by the elementary writers,[38] and are also in common use by the profession.[39] The language employed, however, except as it may tend to disclose intention, is comparatively of little moment; for the intention of the parties when apparent will always control technical terms,[40]

[33] Anthony v. Stevens, 46 Ga. 241; Fuller v. Arms, 45 Vt. 400; Thornton v. Trammell, 39 Ga. 202; Leach v. Leach, 4 Ind. 628.

[34] Moore v. Pitts, 53 N. Y. 85; Gray v. Blanchard, 8 Pick. (Mass.) 284; Ayer v. Emery, 14 Allen (Mass.) 69; Hoyt v. Ketcham, 54 Conn. 60.

[35] Conditional limitations are not included in the scope of these paragraphs, and will be treated separately.

[36] See 4 Kent's Com., 122; 2 Wash. Real Prop., 3.

[37] The estate so granted is sometimes called a base or qualified fee, being such as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. It is a fee because it may possibly endure forever; and it is qualified because its duration depends upon collateral circumstances which qualify and debase the purity of the donation. Wiggins Ferry Co. v. O. & M. R'y Co., 94 Ill. 83.

[38] 4 Kent, Com., 122; 2 Wash. Real Prop., 3.

[39] Hammond v. R'y Co., 15 S. C. 10; Sohier v. Church, 109 Mass. 1; Hooper v. Cummings, 45 Me. 359.

[40] Callins v. Lavalle, 44 Vt. 230;

greater regard being had to the manifest intention than to any particular words which may have been used in expressing it; and when it is clear that technical words have been used to express ideas different from their technical signification, courts are ever inclined to construe them according to such intent.[41]

The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense unless there is a plain intent to the contrary;[42] while the addition of a clause of re-entry or forfeiture unmistakably discloses the nature of the recital.[43] But this clause is by no means necessary if the character of the condition is otherwise established, for forfeiture follows a condition subsequent upon its breach by operation of law;[44] yet the presence or absence of this clause has an important bearing upon the question whether the recital constitutes a condition or a covenant or simply a stipulation, and may be considered with other matters in so determining.[45]

It may be stated, therefore, that no particular form of words is necessary to create a condition, and that the only essential feature is that the intention so to create shall be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for.[46]

The provision for re-entry is the distinctive characteristic of an estate upon condition; and when it is found that by any form of expression the grantor has reserved the right upon

Episcopal City Mission v. Appleton, 117 Mass. 326; Krantz v. McKnight, 51 Pa. St. 232; Saunders v. Hanes, 44 N. Y. 253.

[41] R. R. Co. v. Beal, 47 Cal. 151; Churchill v. Reamer, 8 Bush (Ky.) 256.

[42] Butler v. Huestis, 68 Ill. 594; France's Estate, 75 Pa. St. 220. While the words "upon condition," in a conveyance of land, are apt words to create a condition, any breach of which will forfeit the estate, yet they are not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, is otherwise. Episcopal City Mission v. Appleton, 117 Mass. 326.

[43] Emerson v. Simpson, 43 N. H. 475.

[44] Jackson v. Allen, 3 Cow. (N. Y.) 220; Gray v. Blanchard, 8 Pick. (Mass.) 284; Osgood v. Abbott, 58 Me. 73.

[45] Hartung v. Witte, 18 N. W. Rep. 175.

[46] Lyon v. Hersey, 103 N. Y. 264.

the happening of any event, to re-enter and thereby revest in himself his former estate, it may be construed as such.[47]

Where certain clauses clearly constitute conditions, other stipulations, not put in the form of conditions, will generally be taken as merely constituting covenants;[48] and the rule is that, in deciding between covenants and conditions in doubtful cases, the writing shall be held to be a covenant, upon the theory that a condition, as tending to destroy the estate, would be less favorable to the grantee. But where the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement and no ground for refusing to assign to the subject its predetermined legal character.[49] The law attaches to the act and ascribes to it a definite significance; and the parties cannot be heard to say, where there is neither imposition, fraud nor mistake, that, although they deliberately made a condition and nothing but a condition, they yet meant that it should be exactly as a covenant.[50]

§ 446. **Forfeiture—Revesting of estate.** A mere breach of any or all of the conditions upon which an estate has been conveyed will not have the effect to revest the title in the grantor.[51] He has an option to declare a forfeiture, but this right he may waive either by express act or passive acquiescence.[52] The authorities are unanimous in declaring that to render the breach effectual and revest an estate forfeited as for conditions broken, requires some action on the part of the grantor. If he is not in possession he must make an entry, or by some act equivalent thereto assert a continual claim,

[47] Atty-Gen'l v. Merrimack Co., 14 Gray (Mass.) 586.

[48] St. Louis v. Ferry Co., 88 Mo. 615.

[49] Merrit v. Harris, 102 Mass. 326; Allen v. Florence, 16 Johns. (N. Y.) 47; Blanchard v. R. R. Co., 31 Mich. 51; Wheeler v. Walker, 2 Conn. 196; Mead v. Ballard, 7 Wall. (U. S.) 290.

[50] Blanchard v. R. R. Co., 31 Mich. 43.

[51] M. & C. R. R. Co. v. Neighbors, 51 Miss. 412; Kenner v. American Contract Co., 9 Bush (Ky.) 202; Guild v. Richards, 82 Mass. (16 Gray) 309; Osgood v. Abbott, 58 Me. 73.

[52] Coon v. Brickett, 2 N. H. 163. The waiver of a forfeiture may be inferred from the failure of the party entitled to the estate to re-enter or assert some claim in a reasonable time after the termination

manifesting a determination to take advantage of the breach;[53] if in possession, he must in some manner evidence an intent to hold possession by reason of the breach.[54] Until this has been done the grantee holds his estate, liable only to be defeated, but not actually determined by a forfeiture.[55]

A simple entry upon the land, made with intent to forfeit the grant, accompanied by some unequivocal act or statement, will be sufficient to work a forfeiture;[56] but, as the intention to forfeit is the vital and controlling principle, such intention must in every case affirmatively appear.[57] An actual entry, however, does not seem to be essential; for the breach of condition has the effect to create a right of action which the grantor, even without an actual entry or a previous demand, can enforce by a suit for the land.[58]

§ 447. **Who may take advantage of condition broken.** By the rules of the common law, which discourages maintenance and litigation, nothing that lies in action, entry or re-entry, can be granted over; and while this rule has in many instances been greatly relaxed and changed, it still holds good with regard to conditions, and no grantee or assignee of a reversion can take advantage of a re-entry by force of a condition broken. The privilege is confined to the grantor and his heirs, who alone may take steps to forfeit the estate; and if they neglect or refuse so to do, the title remains in the grantee for all practical purposes unimpaired.[59]

of the estate; and particularly where the grantee is permitted to make valuable improvements after the condition is broken. Kenner v. American Contract Co., 9 Bush (Ky.) 202.

[53] M. & C. R. R. Co. v. Neighbors, 51 Miss. 412; Osgood v. Abbott, 58 Me. 73.

[54] Hubbard v. Hubbard, 97 Mass. 188.

[55] Stone v. Ellis, 9 Cush. (Mass.) 95; Memphis, etc., R. R. Co. v. Neighbors, 51 Miss. 412; Spofford v. True, 33 Me. 283; Speet v. Gregg, 51 Cal. 198.

[56] Where a grantor in a conditional deed went upon the land with two witnesses for condition broken, and there notified the grantee that possession would be taken for the breaking of a condition in the deed, *held*, that these acts were a sufficient entry to revest the estate in her. Jenks v. Walton, 64 Me. 97.

[57] Thus, it was held that the simple act of turning cattle upon land while unimproved and uninclosed, and using the land while in that state as a means of access to adjoining land, was not such an entry for breach of condition as would revest the estate in the grantor. Guild v. Richards, 82 Mass. 309.

[58] Ruch v. Rock Island, 97 U. S. 693.

[59] Smith v. Brannan, 13 Cal. 107;

§ 448. **Who may perform.** Generally, any one may perform a condition who has an interest in it, or in the land whereto it is annexed;[60] and when a condition is once performed, unless it is one which requires continuous performance, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional.[61]

§ 449. **Prevention of performance.** The rule at law is that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with by the act of God, or the law, or the grantor, the estate, once vested, is not thereby divested, but becomes absolute.[62] But equity may apply this rule in the interests of justice merely to the extent of enlarging the time for performance, where it has been hindered at the time when it should have been executed.[63]

If performance is prevented by the act of the grantor the grantee is excused.[64]

§ 450. **Time of performance.** If no time is mentioned for the performance of the condition the general rules relating to agreements would seem to properly apply, and, notwithstanding that it has been intimated the grantee under such circumstances might have his whole life-time,[65] it would appear that the act should be performed within a reasonable time.[66] The circumstances of the grant and the situation of the parties will, in most instances, be a sufficient guide to point out what is a reasonable time.[67] Where compliance with the condition requires a continuous performance, and such performance is discontinued, the same must be resumed within

Gray v. Blanchard, 8 Pick. (Mass.) 284; Merritt v. Harris, 102 Mass. 328; Hooper v. Cummings, 45 Me. 359; Norris v. Milner, 20 Ga. 563; Towne v. Bowers, 81 Mo. 491.

[60] Joslyn v. Parlin, 54 Vt. 670.

[61] Vermot v. Gospel Society, 2 Paine (C. Ct.) 545.

[62] Hughes v. Edwards, 9 Wheat. (U. S.) 489; Merrill v. Emory, 10 Pick. (Mass.) 507; Gadberry v. Shepard, 27 Miss. 203.

[63] Davis v. Gray, 16 Wall. (U. S.) 203.

[64] Houghton v. Steele, 58 Cal. 421; Jones v. R. R. Co., 14 W. Va. 514; Elkhart Car Works v. Ellis, 113 Ind. 215.

[65] Hamilton v. Elliott, 5 Serg. & R. (Pa.) 383.

[66] Hayden v. Stoughton, 5 Pick. (Mass.) 528; Ross v. Tremain, 2 Met. (Mass.) 495.

[67] Land was devised to a town for the purpose of building a schoolhouse, and upon condition subsequent that it should be built upon a certain spot. *Held*, that

a reasonable time in order to prevent a forfeiture of the estate.[68]

Where a grant is made for a specific purpose, not creating a technical condition, as where no words of forfeiture or reentry are used, it would seem that where the grant is unconditional as to the time when the land granted must be used, and without limit as to the time when the use must begin, it cannot be forfeited for non-user, for the parties not having annexed any conditions to the grant in this respect at the time it was made, courts will not undertake to supply them by implication.[69]

§ 451. **Conditions in restraint of alienation.** By the iron rule of the feudal law the grantee of a feud possessed no power of alienation, and upon his death the land reverted to his superior lord. This rigorous rule in time became modified so as to permit an inheritance by the grantee's heirs, but with the right of reversion on the extinction of his blood; and as there always remained in the grantor a possibility of a reverter, this was considered such an interest in the land as entitled him to restrict the power of alienation. And so the law remained until the enactment of what is known as the statute *quia emptores*.[70] This statute cut off the possibility of reverter by giving to every freeman the right to sell his lands at his own pleasure, so that his feoffee should hold them of the chief lord by the same service and customs as the feoffor held them before. The possibility of reverter having thus been destroyed, the grantor's interest in the land ceased, and he was no longer able to prohibit the right of alienation.

this condition was broken by a neglect for twenty years to comply with the condition. Hayden v. Stoughton, 5 Pick. (Mass.) 528.

[68] Adams v. Copper Co., 7 Fed. Rep. 634. A lot of land was granted on condition that it should be held for the support of the minister preaching in a certain church, or in any church subsequently to be erected upon the same site; the proprietors of the church took it down and erected a new one upon a different lot, and allowed the church lot to remain vacant for more than three years. *Held*, that the condition was broken, although the proprietors voted that the church lot should be reserved for the erection of a church whenever they might deem it expedient. Austin v. Cambridgeport Parish, 21 Pick. (Mass.) 215.

[69] Raley v. Umatilla County, 15 Ore. 172.

[70] Enacted in 1290, 18 Edw. I., ch. 1.

Since the enactment of the statute *quia emptores*, therefore, no conditions or restrictions in a conveyance of the fee which prohibits the alienation of land have been allowed to have any effect, and, being repugnant to the estate granted, are considered void upon that ground alone.[71] This principle is well established in the jurisprudence of every American state, and has on several occasions been re-affirmed by the supreme court of the United States.

But while no dissent has been expressed to the rule in a general sense, an entire harmony does not prevail on the subject of partial restraints—that is, restraints against alienation for a limited time, or to certain persons, or to any but certain persons; and while some cases strenuously insist that the power of disposal cannot be arrested for a single day,[72] others insist that such restrictions, if reasonable, are valid and of binding effect.[73] This latter class of cases follow mainly the modern English precedents, and are available, if at all, only in case of gift or devise; but it is difficult to perceive, on principle, why a partial restraint is not just as incompatible with the idea of complete ownership as a general restraint.

To render a restraint of this character effective it is always necessary that there be a reversion or limitation over, for otherwise there would be no one to enforce obedience, and the prohibition would be wholly nugatory.[74] So, too, the intention to create a condition must be apparent; the words "upon condition," or other words of equivalent meaning, should appear, or there should be a clause providing for forfeiture and reentry, these being the usual indications of an intent to create

[71] For a very elaborate and exhaustive discussion of this question, see Mandlebaum v. McDonnell, 29 Mich. 78. The same subject is very fully considered also in De Peyster v. Michael, 6 N. Y. 467. See, also, McCullough v. Gilmore, 11 Pa. St. 370; Bank v. Davis, 21 Pick. (Mass.) 42; McCleary v. Ellis, 54 Iowa 311; Norris v. Hensley, 27 Cal. 439; Anderson v. Carey, 36 Ohio St. 506; Doebler's Appeal, 64 Pa. St. 623; Smith v. Clark, 10 Md. 186.

[72] Mandlebaum v. McDonnell, 29 Mich. 78; and see Oxley v. Lane, 35 N. Y. 347; Anderson v. Cary, 36 Ohio St. 506.

[73] Cowell v. Springs Co., 100 U. S. 55; Hunt v. Wright, 47 N. H. 396; Langdon v. Ingram's Guardian, 28 Ind. 360; Simmonds v. Simmonds, 3 Met. (Mass.) 562; and see Gray v. Blanchard, 8 Pick. (Mass.) 284; Dougal v. Fryer, 3 Mo. 40.

[74] Pace v. Pace, 73 N. C. 119; Tillinghast v. Bradford, 5 R. I. 205.

a condition subsequent. If none of these circumstances are present, the mere fact that the deed is made in whole or in part upon the consideration that the grantee shall not for a certain period sell or convey the property, would not be sufficient to create a condition.

§ 452. **Continued—With respect to persons.** While the general principle that the conveyance of an estate in fee-simple imports absolute ownership in the grantee, and that any restriction or condition imposed inconsistent with or repugnant to the estate so granted is void, seems to have been adopted as a universal rule of law, it has nevertheless been held in England from very early times that partial restraints may properly be annexed to a grant of the fee, and that the grantee may not disregard such partial restraint under penalty of forfeiture of his estate. This doctrine has also been recognized in some of the American states, and in a number of instances it has been held that a condition not to alien to a particular person or persons is valid,[75] though it would seem that a condition not to alien except to particular persons would be inoperative and void.[76] From these authorities the rule would seem to be that a condition is valid if it permits alienation to all the world with the exception of selected individuals or classes, but is invalid if it allows of alienation only to selected individuals or classes.[77] The authorities, however, are not agreed even upon these propositions, and the reports abound in many conflicting decisions.

§ 453. **Continued—With respect to time.** Restraints with respect to time have in several instances been held good and the conditions sustained,[78] provided the restriction is limited to a "reasonable period;"[79] but the weight of authority would seem to be against the validity of restraints upon alienation, however limited in time.[80]

[75] Cowell v. Col. Springs Co., 100 U. S. 55; Gray v. Blanchard, 8 Pick. (Mass.) 284; Jackson v. Schutz, 18 Johns. (N. Y.) 174; Jauretche v. Proctor, 48 Pa. St. 466.

[76] Anderson v. Cary, 36 Ohio St. 506; McCullough v. Gilmore, 11 Pa. St. 370.

[77] See Gray, Restraints on Alienation, 22.

[78] Stewart v. Brady, 3 Bush (Ky.) 623; Dougal v. Fryer, 3 Mo. 40; Langdon v. Ingram, 28 Ind. 360.

[79] Gray v. Blanchard, 8 Pick. 284.

[80] Roosevelt v. Thurman, 1 Johns. Ch. (N. Y.) 220; Oxley v. Lane, 35 N. Y. 340; Mandlebaum v. McDonnell, 29 Mich. 78; Anderson v. Cary, 36 Ohio St. 506.

But while the rule prohibiting restraints on alienation is well established it is not without apparent exceptions, and one of the most marked of these exceptions occurs where the grant is for a charitable use. In such a grant the rule against perpetuities will not apply and the donor may impose any condition which shall prevent the diversion of the trust estate from the uses upon which it was given, even though he thereby renders the land inalienable.[81] This result follows, however, only when the grant or trust is made by way of gift. The trust, in such case, being the creation of the donor, he may impose upon it such character and qualifications as he may see fit, and equity will protect and enforce same. But when the grant is made upon adequate consideration, as where conveyance is made to a religious society for a fair price paid, notwithstanding that the *habendum* of the deed be to hold for specific uses with a restriction against alienation, the inseparable incidents of a fee will attach and the condition will be void.[82]

§ 454. Continued—With respect to prescribed and prohibited uses. A grant of land for a prescribed use does not necessarily imply a condition, although such grants are usually coupled with conditions, and not infrequently with stipulations for re-entry and forfeiture. But the rule is fundamental that an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation; therefore, merely reciting in a deed made upon an expressed consideration, however small, that the grantee is to do certain things or that the property is to be used for certain specified purposes, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture.[83] Numerous cases may be found in the books where this doctrine has been recognized and applied; and while courts will usually lend their aid to effectuate and carry out expressed intentions, yet as the rule

[81] Perin v. Cary, 24 How. (U. S.) 465; Jones v. Habersham, 107 U. S. 174; Mills v. Davision, 54 N. J. Eq. 659.

[82] Magie v. Church, 13 N. J. Eq. 77.

[83] Taylor v. Binford, 37 Ohio St. 262, where a conveyance for the use of school purposes only was held not to create a condition; Carter v. Branson, 79 Ind. 14, where property was deeded to the use of Society of Friends as long as needed; and see Packard v. Ames, 16 Gray (Mass.) 327; M. E. Church v. Public Ground Co., 103 Pa. St.

in regard to forfeitures for breach of condition is one of the technical rules of the common law which has never been favored by the courts of this country, and which has always been strictly construed whenever invoked, unless it clearly appears that the prescribed use was intended to be a condition subsequent created by apt words, courts will refuse to entertain jurisdiction for forfeiture or re-entry, and in like manner will refuse to supply conditions by implication when they were not annexed at the time the grant was made.[84]

Where, however, the deed provides that the land shall be forfeited and revert if used for other purposes than those specified, a condition is thereby created,[85] and upon proof of breach the grantor may re-enter and repossess the land.[86]

§ 455. **Continued—Intoxicants.** The current of modern authority sustains the proposition that, where a deed conveys land in fee, but upon the express condition that neither the grantee nor his heirs or assigns shall ever sell or permit to be sold any intoxicating liquors upon the premises, and that the grant shall be forfeited and the land revert back to the grantor whenever such condition shall be broken, the estate so conveyed is an estate upon condition subsequent; that the condition is valid, and until broken runs with the land, and is binding not only upon the grantee himself but also upon his assigns, and that the land may be recovered back by the grantor from the grantee or from any assignee of his who may commit a breach of said condition.[87]

The general theory upon which restrictions of this character are sustained seems to be, that a grantor in disposing of his property has a right to impose such conditions as shall prevent its use by the grantee in a manner calculated to diminish the value of his remaining land or impair its eligibility for other purposes. It would follow, therefore, that the grantor

608; Brown v. Caldwell, 23 W. Va. 187; Thornton v. Trammell, 39 Ga. 202.

[84] Raley v. Umatilla County, 15 Ore. 172; and see Emerson v. Simpson, 43 N. H. 475; Gadberry v. Sheppard, 27 Miss. 203; Woodworth v. Payne, 74 N. Y. 196.

[85] Hoyt v. Ketcham, 54 Conn. 60; Gilbert v. Peteler, 38 N. Y. 165.

[86] Plumb v. Tubbs, 41 N. Y. 442; Collins v. Marcy, 25 Conn. 242; Gray v. Blanchard, 8 Pick. (Mass.) 284; Sperry v. Pound, 5 Ohio 189.

[87] O'Brien v. Wetherell, 14 Kan. 616; Plumb v. Tubbs, 41 N. Y. 442; Cowell v. Colorado Springs Co., 100 U. S. 55; Collins v. Marcy, 25 Conn. 242; Sioux City, etc., R. R. Co. v. Singer, 49 Minn. 301; Chippewa

should preserve a consistency in disposing of the remaining land, and that all deeds of contiguous or adjacent property should contain the same restrictions. Hence, if a deed with restrictive conditions has been made the grantor should not be permitted to afterwards sell an adjoining parcel without restrictions and thereby diminish the value or impair the eligibility of his former grantee's property by insisting upon the observance of the restriction, and it has been held, that should such deeds be made, even though the restriction may have been omitted from such subsequent deeds by mistake, their effect would be to create a waiver of the right of forfeiture as for condition broken.[88]

§ 456. **Conditional limitations.** An estate upon condition differs from what is known as a conditional limitation, or, as it is sometimes called, a determinable fee. The estate in either case is conditional, but the distinction is that the former, while liable to defeat, yet requires some act to be done by the person who has the right to avail himself of the condition, and is not in fact determined until there has been an entry or some other equivalent demonstration; the latter, on the contrary, is determined by operation of law without any act by any person, and ceases to exist upon the happening of the event by which its limitation is measured.[89] In the former the reservation can only be made to the grantor or his heirs, who alone can take advantage of a breach of the condition,[90] while a stranger may have the benefit of a limitation.[91]

§ 457. **Restrictive stipulations.** There is another class of recitals, which, although partaking of the nature and employing much the same language as both covenants and conditions, has yet been accorded an operation and effect different from either. Neither legislative nor judicial learning has yet given them a distinctive name, and perhaps they cannot be better

Lumber Co. v. Tremper, 75 Mich. 36; Bad River Lumbering Co. v. Kaiser, 82 Wis. 166.

[88] Jenks v. Pawloski, 98 Mich. 110.

[89] Brattle St. Church v. Grant, 3 Gray (Mass.) 146; Miller v. Levi, 44 N. Y. 489; Henderson v. Hunter, 59 Pa. St. 340; Osgood v. Abbott, 58 Me. 73; Wheeler v. Walker, 2 Conn. 196.

[90] Smith v. Brannan, 13 Cal. 107; Gray v. Blanchard, 8 Pick. (Mass.) 284; Hooper v. Cummings, 45 Me. 359.

[91] Southard v. R. R. Co., 26 N.J.L. 1; Owen v. Field, 102 Mass. 90.

described than as stipulations operating by way of restriction. In some instances such recitals have the effect of real or personal covenants, but more frequently they are taken as part of the description of the estate granted, and which preclude the grantee and those claiming under him from doing any act in violation of the restrictions.[92] This is particularly true where the recital creates rights in the nature of easements for the benefit of the land retained.[93] In such recitals the use of the technical words "conditioned," "provided, however," etc., have no other or further effect than to produce a restriction which those who take the estate are bound to observe. No forfeiture follows upon the violation or breach of the stipulation; nor will the grantor ordinarily have a right of action, as for covenant broken, but equity will restrain the violation or enforce the performance of the stipulation according to its terms.[94] This procedure is most in accordance with the spirit of the times, and is manifestly the true remedy for the breach of even an acknowledged condition subsequent. The general effect of this class of stipulations, together with their practical application, will be treated in the subsequent paragraphs in connection with the other phases of the subject.

§ 458. **Restrictions on use.** As has been shown, so long as the beneficial enjoyment of an estate conveyed is not materially impaired, any reasonable condition prescribing the mode of its use will be valid. A covenant in restraint of trade is valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into; and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee.[95] And so, where a grantee binds himself by a covenant in his deed limiting the use of land purchased in a particular manner so as not to interfere with the trade or business of the grantor, the covenant is valid and binding not only as between the parties but

[92] Fuller v. Arms, 45 Vt. 400; Warren v. Meyer, 22 Iowa 351.

[93] Dorr v. Harrahan, 101 Mass. 531; Phœnix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr. (N. Y.) N. S. 266; Seymour v. McDonald, 4 Sandf. Ch. (N. Y.) 502.

[94] Trustees v. Cowen, 4 Paige, Ch. (N. Y.) 510; Ayling v. Kramer, 133 Mass. 12.

[95] Chappel v. Brockway, 21 Wend. (N. Y.) 157; Parker v. Nightingale, 6 Allen (Mass.) 341; Burbank v. Pillsbury, 48 N. H. 475.

their privies as well, and may be enforced against a grantee of the covenantor taking title with notice of the restriction; and this although the assignees of the covenantor are not mentioned or referred to.[96]

Nor does it seem necessary, in order to charge third parties, that a covenant of this character should be one technically running with the land; it is sufficient that subsequent purchasers have notice of it. It is said that this doctrine and the cases which support it proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land; and in the exercise of its ample powers a court of equity may impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title.[97]

One of the difficulties connected with this branch of the subject is the indefinite character frequently given to restrictions of this kind. Thus, it is common to stipulate that the premises shall not be used for any "nauseous" or "offensive" trade, or in a manner calculated to "disturb the quiet of the neighborhood." This leaves a wide margin for construction and has resulted in a number of seemingly contradictory decisions.[98]

§ 459. Building restrictions. An important class of the stipulations now under consideration is found in the clauses

[96] Trustees v. Lynch, 70 N. Y. 440. As where N. was the owner of certain lands containing deposits of building sand, and the sale of the sand constituted his only business. S. offered to purchase a small parcel of the land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand from off the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed to another without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Said third person opened a pit on his land and sold sand therefrom. *Held*, that an action was maintainable to restrain such sale. Hodge v. Sloan, 107 N. Y. 244.

[97] Hodge v. Sloan, 107 N. Y. 244.

[98] See Tobey v. Moore, 130 Mass. 448; Dorr v. Harrahan, 101 Mass. 531.

often inserted in deeds to secure uniformity in street fronts, a pleasing correspondence in the architecture of contiguous buildings, or to secure light, ventilation or unobstructed views of a neighborhood. Such clauses have a wide range of operation and a great diversity of character, but all come as a rule under the generic term "building restrictions." They are designed ordinarily to prevent such use of the premises by the grantee and those claiming under him as might diminish the value of the residue of the land belonging to the grantor or impair its eligibility for particular purposes, and in this respect they partake somewhat of the character of a reservation annexed to and forming a part of the description of the estate. In framing such clauses provision is rarely made either for forfeiture or re-entry, and even where such provision is made, its operation will usually be denied where other adequate remedies exist.

The exact effect to be given to this class of stipulations is not well determined, but it seems clear that they do not fall within the true definition of a condition, which, on breach, carries with it the right of reverter. They have been held to constitute neither a condition precedent nor subsequent, nor a covenant that the grantee would abide by their terms; but to be rather a part of the description of the estate, and to preclude those claiming under the grantee from making erections on the land in violation of the restrictions.[1]

The general tendency of the decided cases seems to lean toward the adoption of a strict rule of construction of all clauses of this character, and many instances may be found in the books where apparently small and trivial violations of imposed restrictions have been rigidly corrected.[2] Indeed, the

[1] So held with reference to a clause in a deed of warranty conveying land by metes and bounds, "conditioned that no building or erection is ever to be made on said land except a dwelling-house, and out-buildings for the same; . . . also that no building is to be erected on said land which shall extend more than twenty feet southerly of the main body of the dwelling-house now owned and occupied by" the grantor. But this decision seems to have been reached largely on the principle that the obstruction of the view from the grantor's dwelling-house was a proper subject of reservation, and such effect is given to the stipulation. Fuller v. Arms, 45 Vt. 400.

[2] Thus, under a stipulation that a passage-way shall be kept open and maintained of a certain width,

question of injury or damage does not enter into the enforcement of a building restriction; it is enough that there has been a violation of the terms of the agreement, and courts will grant relief against same without inquiring whether the erection will be injurious or beneficial, on the ground that a covenantee has a right to have the actual enjoyment of property as stipulated for by him.[3]

Building restrictions are usually inserted at the instance of the grantor, and, in effect, serve to impose a condition in the nature of a servitude or easement upon the land that is sold for the benefit of the land which the grantor still retains; but the condition may be and sometimes is imposed upon the land that is retained and in favor of the land that is sold; and where an owner creates a servitude of this character on his own lands, binding by express words his heirs and assigns, such restriction is in the nature of a contract, and may be enforced against any assignee with notice.[4]

§ 460. **Prohibited employments.** Conditions imposing limited restrictions upon the use of granted property or the method of its enjoyment, however much they may affect the value or the nature of the estate, are generally upheld and enforced where they do not tend to limit or destroy its alienable or inheritable character. This is particularly true with reference to the employment of the premises for purposes obnoxious to the senses or to health. In this way slaughter-houses, soap factories, distilleries, livery-stables, tanneries and machine-shops have in a multitude of instances been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors or disturbing noises, have become de-

bay windows may not be erected over the passage-way. Attorney-Gen. v. Williams, 140 Mass. 329. So, also, land was conveyed with the restriction that no building should be erected "within twenty feet of C. street." The front wall of a building erected was twenty feet from C. street, but a part of the roof and a dormer window were less than twenty feet from the street. *Held*, a violation of the restriction. Bagnall v. Davies, 140 Mass. 76. And see Buck v. Adams, 45 N. J. Eq. 552.

[3] Cornish v. Wiessman, 56 N. J. Eq. 610; Atty-Gen. v. Algonquin Club, 153 Mass. 447.

[4] Thus, a covenant with the grantee, "his heirs and assigns" in a deed of conveyance, binding the grantors, "their heirs and assigns," not to build any improvement inferior to certain specified qualifications on any of certain lots retained by the grantors, constitutes an in-

sirable as places for residence of families.[5] That such a purpose is a legitimate one, and may be carried out consistently with the rules of law by reasonable and proper covenants, conditions or restrictions, cannot be doubted.[6]

Purchasers may acquire by their deeds the right to insist upon the observance of a covenant or stipulation in the nature of a covenant, not to permit the erection or maintenance of any noxious, unwholesome, offensive or dangerous establishment, calling or trade, where such covenants in the deeds for different lots are nevertheless made for the mutual benefit and protection of all the purchasers of lands in a designated block or neighborhood.[7] So, also, while a previous purchaser from the original owner of the block or neighborhood can not sue at law upon the covenant in the deed to a subsequent purchaser, yet equity may protect him by injunction against the carrying on of any noxious business or trade upon the lot of such subsequent purchaser.[8]

The usual remedy for the violation of covenants of this character is an injunction to keep within the terms of the agreement; and where the circumstances show no reasonable ground for the violation, a court of equity will compel the offending party to comply with the obligation which was attached to the property by the terms of the grant. It must frequently happen, however, that the changed circumstances of the property and its surroundings would render it inequitable to deprive a purchaser of the privilege of conforming his property to the character of the neighborhood so as to use it to greater advantage and in no respect to the detriment of his grantor. Restrictions on use, or prohibitions of specified employments, are generally made for the better improvement of lands and to secure permanent values, yet the character of entire neighborhoods will sometimes change in such a manner that the very object of the restriction can only be attained by

cumbrance on such lots which is binding on a subsequent grantee thereof with notice. Halle v. Newbold, 14 Atl. Rep. (Md.) 662.

[5] Cowell v. Colorado Spring Co., 100 U. S. 55; Plumb v. Tubbs, 41 N. Y. 442; Collins v. Marcy, 25 Conn. 242; Sperry v. Pound, 5 Ohio 189; Gray v. Blanchard, 8 Pick. (Mass.) 284.

[6] Clark v. Martin, 49 Pa. St. 289; Whitney v. Railway Co., 11 Gray (Mass.) 359.

[7] Barrow v. Richard, 8 Paige (N. Y.) 351; Columbia College v. Lynch, 70 N. Y. 452.

[8] Barrow v. Richard, 8 Paige (N. Y.) 351.

its violation. If, for any reason, therefore, not referable to the purchaser, an enforcement of the covenant would defeat the ends originally contemplated by the parties, a court of equity may well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered that the conditions and restrictions of the covenant are no longer applicable to the existing state of things. And so, notwithstanding the contract may have been fair and just when made, if subsequent events have made performance by the purchaser so onerous that its enforcement would impose great hardship upon him with little or no benefit to the grantor, equity will deny its relief to the covenantee in the enforcement of the stipulation.[9]

§ 461. **Enforcement of restrictions.** A stipulation by way of restriction, not amounting to a condition, if not in restraint of trade or otherwise illegal, may be and usually is enforced by injunction,[10] and this remedy may be had not only against an immediate grantee but against all subsequent purchasers with notice[11]; and the further fact that a penalty or forfeiture is imposed for doing a prohibited act is no obstacle to the interposition of equity by injunction.[12]

It is a further rule that such relief may be granted although no actual pecuniary damage may have been sustained or is to be expected.[13] Nor is the remedy confined to the grantor and his heirs, but it may be resorted to by his assigns as well.[14] And generally, when restrictions inserted in the deed of a particular lot are part of a general scheme for the benefit and improvement of all the lands included in a larger tract, a grantee of any portion of the lands may, in a proper case, enforce them against his neighbor.[15]

[9] Columbia College v. Thacher, 87 N. Y. 311; and see Willard v. Tayloe, 8 Wall. (U. S.) 557.

[10] Tallmadge v. Bank, 26 N. Y. 110; Morris v. Tuskaloosa Mfg. Co., 83 Ala. 565.

[11] Webb v. Robbins, 77 Ala. 176; Payson v. Burnham, 141 Mass. 547; Gilbert v. Peteler, 38 N. Y. 165.

[12] Watrous v. Allen, 57 Mich. 362.

[13] Atty-Gen. v. Algonquin Club, 153 Mass. 447.

[14] A condition that the front line of the building to be erected on the granted lot shall be placed ten feet back from the street and parallel thereto, *held*, a valid restriction capable of enforcement by a grantee of another lot from the common grantor. Hamlen v. Werner, 144 Mass. 396.

[15] Whitney v. Union Ry. Co., 11 Gray (Mass.) 359; Payson v. Burnham, 141 Mass. 547.

§ 462. **Avoidance of restrictions.** While the law will compel parties to adhere to the contracts they have voluntarily entered into and grant its aid to secure their enforcement, yet with respect to agreements restricting the use of lands the rule is subject to some modification. As has been shown, the condition and character of the surrounding lands have much to do with its practical application. Thus, where there has been such a change in the character of the neighborhood as to defeat the object and purpose of the agreement, and to render it inequitable to deprive the owner of the privilege of conforming his property to the altered circumstances, relief will not usually be granted against a violation. As, where lands have been sold with a proviso restricting the use of same to that of private residences only and the neighborhood becomes a manufacturing locality, such a change in the surroundings would justify the refusal of a court of equity to enforce the covenant.[16] The covenantee might, in case of breach, pursue his remedy at law for damages, but a release from the operation of the restrictive covenants should be decreed on the entry of such judgment,[17] and if the complainant should have no remedy at law, while the prayer for injunction might be denied, the bill could still be retained for the purpose of assessing damages.[18]

§ 463. **Conveyances for support.** A very large and important class of conveyances, conditional in form, is constituted by deeds given in consideration of the future support of the grantor. The draft of these conveyances usually embodies clauses which, if they do not create at least partake of the nature of conditions; yet the tendency of the courts has been to divest them of their conditional character, particularly where the grant is absolute and the agreement for support is stated to be the consideration.[19] In such cases a liberal interpretation has been adopted, in accordance with established equity rules; and unless a condition is clearly manifest the

[16] Columbia College v. Thacher, 87 N. Y. 311; Jackson v. Stevenson, 156 Mass. 496; Page v. Murray, 46 N. J. Eq. 325.

[17] Amerman v. Deane, 132 N. Y. 355.

[18] Jackson v. Stevenson, 156 Mass. 496.

[19] See Walters v. Bredin, 70 Pa. St. 235; Tracy v. Hutchins, 36 Vt. 225; Berryman v. Schumaker, 67 Tex. 312; Hubbard v. Hubbard, 97 Mass. 188.

agreement will be construed a covenant, sounding in damages only.[20]

Attempt is sometimes made to give to conveyances of this character the operation and effect of mortgages, upon the theory that any conditional conveyance given for the performance of an obligation partakes of the essential character of a mortgage; but the better and prevailing opinion would seem to be that the rules of law relating to mortgages have little or no application to them. It is said that wherever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to a limited extent; and the party, if relieved by a court of equity from forfeiture resulting from the non-performance of the condition, will not be relieved as in case of a mortgage. It is not, however, intended to say that the same principle of justice which has led courts of equity to establish the system of relief from forfeiture in the case of mortgages will not entitle a party to analogous relief in a case where the design of the parties is to make a conveyance by way of security. Yet, even where a bond or other writing is executed contemporaneously with the conveyance, the grant is not regarded as a mortgage, but effect is given to it according to its manifest intent, which is a conveyance with condition subsequent.

Where the agreement is construed to be a condition subsequent a breach of the same carries with it the usual consequences that follow other conditions subsequent, and entitles the grantor to enter and reclaim possession after demand of performance and a failure to comply.[21] A demand is usually an essential prerequisite,[22] for mere neglect to perform the condition does not of itself determine or defeat the estate. At best such a course only exposes it to be defeated and determined at the election of the grantor; for the rule is general that, to effect a forfeiture, there must be a demand on the part of the persons entitled to insist upon its performance, whether the condition consists in the payment of money or the per-

[20] Martin v. Martin, 131 Mass. 547; Bortz v. Bortz, 48 Pa. St. 386; Harris v. Shaw, 13 Ill. 456; Gallaher v. Herbert, 117 Ill. 160.

[21] Lindsey v. Lindsey, 45 Ind. 552; Bradstreet v. Clark, 21 Pick. (Mass.) 389.

[22] Risley v. McNiece, 71 Ind. 434.

formance of some other act, and a refusal on the part of the person in whom the title is vested.[23]

The language used in such deeds will, however, be deemed to have created a covenant rather than a condition whenever such construction is practicable,[24] while the rule is general that a court of equity will never lend its aid to divest an estate for a breach of a condition subsequent, but where a compensation can be made in money will relieve against such forfeitures and compel the complaining party to accept a reasonable compensation in money. Where, therefore, the language is reasonably susceptible of the construction that the parties intended to secure the payment of stipulated or ascertainable sums of money during the life-time of the grantor, no condition subsequent will be deemed to have been created. If a stipulated amount and the manner of its payment formed one of the clauses of the deed the grantor would be entitled to have a lien declared in his favor for the payment of such amount by the grantee or his assigns, the record of the deed being notice to all persons of the reservation contained therein in favor of the grantor.[25]

A substantial compliance with the terms of a contract of maintenance is all that is usually required of the grantee,[26] while the beneficiary may waive performance by refusing to receive the support.[27] In such event the grantee will be released from the obligation of further performance.[28]

§ 464. **Conveyance for specific use.** Aside from the restrictive stipulations often inserted in deeds of absolute conveyance, the effect of which has been considered, grants are often made upon an express limitation or a specific designation of the use for which the property is to be employed, and either expressly or by implication prohibiting its use for other purposes. Such conveyances are clearly in the nature of conditional grants. It would seem, however, where property has been conveyed for a specific purpose, that an *habendum,* "to have and to hold," etc., "for the use aforesaid," cannot be con-

[23] Cory v. Cory, 86 Ind. 567.

[24] Gallaher v. Herbert, 117 Ill. 160.

[25] Gallaher v. Herbert, 117 Ill. 160; and see Berryman v. Schumaker, 67 Tex. 312.

[26] Bresnahan v. Bresnahan, 46 Wis. 385; Joslyn v. Parlin, 54 Vt. 670.

[27] Boone v. Tipton, 15 Ind. 270.

[28] Clark v. Barton, 51 Ind. 165.

strued as a condition in the grant or a limitation of the estate[29]; nor will the addition of words to the description of the property indicating the character of the use to which the property is to be put of themselves create a condition subsequent.[30]

Where a conveyance of land to a religious or eleemosynary corporation is absolute, without condition or reservation, it creates no trust beyond that general duty which the law puts upon a corporation of using its property for the purposes contemplated in its creation. That sort of trust is not one which fastens upon the land and inheres in the title, going with it where it passes, or restraining alienation, but is founded solely upon the corporate character of the grantee. The title being absolute, the corporation may transmit it to its own vendee. When this occurs the proceeds take the place of the

[29] Ward v. Screw Co., 1 Cliff. (C. Ct.) 565; Raley v. Umatilla County, 15 Ore. 172; Farnham v. Thompson, 34 Minn. 330. In Harris v. Shaw, 13 Ill. 456, a deed was made to certain persons therein named as county commissioners. The consideration was the location, on the land therein described, of the county seat. The *habendum* clause was in these words: "To have and to hold the same, and all and singular, the premises above mentioned, and every part and parcel thereof, with the appurtenances, unto the said county commissioners for Tazewell, or their successors in office, and to the only proper use and behoof of the said county of Tazewell, forever." The court held that the deed conveyed an absolute fee-simple.

[30] As where, in a conveyance of land to a religious corporation, the words "for the purpose of erecting a church thereon only" followed the description of the property. Farnham v. Thompson, 34 Minn. 330. In Brown v. Caldwell, 23 W. Va. 187, a grant of land for a consideration to a trustee, upon trust that the trustee "shall at all times permit all the white religious societies of Christians, and the members of such societies, to use the land as a common burying ground, and for no other purpose," is not a grant upon condition. In City of Portland v. Terwilliger, 16 Ore. 465, the defendant agreed to convey land to the plaintiff, and plaintiff agreed that one-fourth of the land should be used as a cemetery, and to expend $400 in building a road to the same; that the proceeds of the sales of burial lots should be used in improving the grounds; and that one burial lot be conveyed to each of the grantors. A deed was executed pursuant to the agreement, upon the "expressed terms, conditions and reservations," and in consideration that plaintiff perform such stipulations; but no right of entry was reserved, nor was it provided that said estate should cease on nonperformance. The grantee was put in possession. *Held*, that such deed conveyed an absolute estate.

land and become the corporate property, which, if necessary, a court may devote to the proper uses and purposes which the corporation was framed to subserve, and to accomplish which the property was bestowed. It is in no respect diverted from the corporation, or even from denominational or other prescribed uses; and, so far as there is an element of trust, a sale is consistent with and not destructive of it.[31]

§ 465. **Resume.** It would seem, therefore, from a review of the foregoing paragraphs, that there are three well-defined species of conditions now employed in conveyances in this country, all having for an object the same general purpose, but in each instance with a different operation and effect, viz.: (1) Conditions technically so called, operating as a defeasance upon breach; (2) covenants proper, operating as promises merely, and giving a right of action for damages in case of breach; and (3) conditional covenants or stipulations, operating by way of restriction and enforceable according to their terms on breach or violation. In the creation of each of these special classes the same operative words may be employed, but their value and effect is to be determined rather from the spirit than the letter of the text. They must be interpreted in the light of the other provisions of the deed, while the attendant circumstances, the situation of the parties and the state of the property conveyed are competent to aid in estimating their effect.[32]

[31] Matter of First Presbyterian Church, 106 N. Y. 251; Rawson v. School Dist., 7 Allen (Mass.) 125. In Episcopal City Mission v. Appleton, 117 Mass. 326, land was conveyed for nominal consideration to a religious society, its successors and assigns, "upon and subject to the condition" that the society was to continue to hold, occupy, and improve the land and chapel standing thereon, for the support of religious worship in conformity with the usage of the Protestant Episcopal Church, "and also upon the further condition" that no building should be erected upon a certain portion of the land conveyed until after an adjoining owner had ceased to keep open a contiguous strip of land, or until after such time as the chapel should cease to be used as a chapel in accordance with the above provision. It was held that the deed did not create a condition, but that the grantees got a title in fee. In Taylor v. Binford, 37 Ohio St. 262, C., being the owner of land, conveyed it, for a valuable consideration, to a township board of education, its successors and assigns, "for the use of school purposes only." *Held*, that the grantees acquired an absolute fee-simple.

[32] U. S. Mfg. Co. v. Grass, 93 Ill.

The subject of conditional covenants and stipulations, although as old as our law, would still seem to be a vexed question in this country. The works of the leading elementary writers shed but a faint and uncertain light upon it, and in some instances the subject is expressly avoided or passed with briefest mention.[33] The utterances of the courts are in the main characterized by a cautious timidity, and, except in reference to the broad and commonly accepted principles, are discordant and often contradictory. Few if any positive rules can be laid down as a result of their perusal; but it is believed that the following deductions and inferences are supported by the volume of authority:

First. Where the recital is in form a condition—as where the grant is expressly made upon condition, and no words other than the granting clause control or modify the apparent effect of the recital or tend to negative the idea therein expressed—such recital should be construed as a condition; and the estate, under a deed containing the same, will remain defeasible until the condition be performed, destroyed or barred by the statute of limitations or by estoppel,[34] except (1) when the condition imposed is impossible[35]; (2) requires the performance of what is contrary to law or good morals,[36] or (3) is repugnant to the estate granted.[37]

Second. Where the recital, whatever may be the technical language employed, has added a conclusion with a clause of re-entry; or, without such clause, if there be a declaration of defeasance or forfeiture, in case of the performance or nonperformance of some particular act, the recital should be construed a condition, for the breach of which the grantor or his

483; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230.

[33] See 2 Wash. Real Prop., 4; 1 Hill, Real Prop., 526. They are very learnedly and logically discussed in Bingham on Real Property, but mainly with reference to the validity of conditions in absolute conveyances. See Bing. Real Prop., 270 *et seq.*

[34] Sperry v. Pond, 5 Ohio 389; R. R. Co. v. Neighbors, 51 Miss. 412; Chapman v. Pingree, 67 Me. 198; Ruch v. Rock Island, 97 U. S. 693; Cowell v. Col. Springs Co., 100 U. S. 55; Hammond v. R'y Co., 15 S. C. 10.

[35] Jones v. R. R. Co., 14 W. Va. 514; Hughes v. Edwards, 9 Wheat. (U. S.) 489.

[36] Taylor v. Sutton, 15 Ga. 103; Bank v. Davis, 21 Pick. (Mass.) 42.

[37] Gadberry v. Sheppard, 27 Miss. 203; De Peyster v. Michael, 2 Seld. (N. Y.) 467.

heirs may enter and repossess the land to the exclusion of the grantee, his heirs or assigns.[38]

Third. Where the recital, although unaccompanied with any proviso, the word "condition" not being mentioned, yet clearly shows that the performance or non-performance of the act named is the only consideration or inducement for the deed, it should ordinarily be construed a condition.[39] These three deductions may easily be made from the precedents, but in the opinion of the writer are opposed to principle and in conflict with American legal theory, as are also the precedents on which they are based. Indeed, it is difficult to understand how any instrument of conveyance which carries the full title and all the estate, leaving no reversion in the grantor, or which upon its face distinctly negatives all idea of tenure, or of the relation of landlord and tenant, or of ultimate title in others, can by any conditions inserted be operative to defeat the grant, for a right of re-entry always supposes an estate in the grantor.[40]

Fourth. Analogous to the last deduction is that of a grant upon the "express condition" that the property shall be used only for a certain and specified purpose, with a clause of reverter, or of limitation over, upon breach. In such cases, and particularly when the condition partakes of the consideration, the recital must be construed a condition. But this class of cases is essentially different from those previously considered in that the condition annexed is a part of or defines the estate granted, and the breach does not in fact work a forfeiture, but limits the estate, which ceases and determines without any entry or other act on the part of the reversioner, the condition being a conditional limitation.[41]

Fifth. Where a recital, although importing a condition,

[38] Collis v. Marcy, 24 Conn. 242; Emerson v. Simson, 43 N. H. 473; Thomas v. Ricord, 47 Me. 500; Jackson v. Topping, 1 Wend. (N. Y.) 388; Van Rensselaer v. Hays, 19 N. Y. 95; Plumb v. Tubbs, 41 N. Y. 442; Adams v. Lindell, 5 Mo. App. 197; Cowell v. Col. Springs Co., 3 Colo. 82.

[39] Railroad Co. v. Hood, 66 Ind. 580; Austin v. Cambridgeport, 21 Pick. 215.

[40] Scott v. Lunt, 7 Pet. 606; Blight v. Rochester, 7 Wheat. 547; and see Osterhout v. Shoemaker, 3 Hill (N. Y.) 518; De Peyster v. Michael, 6 N. Y. 467; Van Rensselaer v. Reed, 26 N. Y. 558.

[41] Hunt v. Beeson, 18 Ind. 380; Hooker v. Turnpike Co., 12 Wend. (N. Y.) 371.

does not expressly and in terms declare the same, and provides only for the performance of some act, or imposes some burden or duty upon the grantee, but does not stipulate for a re-entry or declare a forfeiture, the acceptance of the deed is in effect an agreement to perform the act or assume the burden, and the recital should be construed a covenant.[42] This deduction, while supported by precedent and in consonance with reason, is yet subject to more doubt than any which have preceded. The courts usually seem to incline to this view under a choice of difficulties, and more because "forfeitures are odious" than for the application of any positive principle. In discussing the subject there is a manifest constraint in most cases, and in many instances the subject is disposed of summarily by the application of the familiar doctrine that where doubt or ambiguity exists recitals should be construed as covenants rather than conditions. The authorities are inharmonious and often contradictory, but the majority support the proposition.

Sixth. Where the recital, although importing a condition, provides for its breach a penalty or compensation other than forfeiture, the recital should be construed a covenant.[43]

Seventh. Where the recital, although importing a condition, has added no clause of re-entry or declaration of defeasance, but clearly indicates a charge upon the estate, the acceptance of the deed creates a duty the due observance of which is obligatory on the grantee and those claiming under him. The recital in such case does not create a condition and takes effect only by way of restriction. Though full effect is to be given to it according to its terms its operation cannot be extended by implication, and it should be construed only as part of the description of the estate granted.[44] This proposition is not only supported by ample authority, but is in full harmony with our theory of titles and estates. In its general features it resembles the fifth deduction above made, and

[42] Conger v. R. Co., 15 Ill. 366; Thornton v. Trammel, 39 Ga. 202; Randall v. Latham, 36 Conn. 48; Laberee v. Carleton, 53 Me. 213.

[43] Board of Ed., etc., v. Trustees, etc., 63 Ill. 204; Hartung v. Witte, 18 N. W. Rep. 175.

[44] Warren v. Meyer, 22 Iowa 351; Packard v. Ames, 16 Gray (Mass.) 325; Fuller v. Arms, 45 Vt. 400; Skinner v. Shepard, 130 Mass. 180; Trustees v. Cowen, 4 Paige, Ch. (N. Y.) 510; Dorr v. Harrahan, 101 Mass. 31; Seymour v. McDonald, 4 Sandf. Ch. (N. Y.) 502.

sometimes partakes of its nature in so far that the restrictions may also take effect as a covenant. But no forfeiture follows a breach as a consequence, nor will any action ordinarily result for damages. The fundamental idea of conditions annexed to estates is to restrain the commission of an act on the one hand or compel its performance on the other; forfeiture affects neither of these ends, but simply provides a penalty, which, in a majority of instances, is not in furtherance of the true intent as expressed in the instrument, and, except in case of conditional limitations, is repugnant to the grant.

Eighth. The test for determining between a condition and a covenant is in the application of the language employed. A condition can only be made by the grantor; the language must be his. A covenant may be made by the grantee, and when the language used amounts to an agreement on the part of the grantee a covenant is raised. A covenant is a contract; a condition, something affixed by way of penalty for the nonfulfillment of the terms imposed. In the former case the grantee agrees to do or refrain from doing some specific thing; in the latter he makes no agreement, but takes subject to the terms of the condition. If the clause be doubtful it will always be construed a covenant. If clearly expressed, effect must be given to it according to its terms. When forfeiture is not distinctly expressed or necessarily implied, and no special agreement is stated or imported, the clause creates a charge upon or incident of the estate; but the question in most cases will depend upon the apparent intention of the parties rather than any fixed rules of construction, and, until clearer ideas of title, tenure and estate are made to prevail, uncertainty and doubt will attend the creation or attempted creation of reversionary rights and forfeitures, or the annexation of conditions to vested estates.

CHAPTER XVIII.

RESERVATIONS AND EXCEPTIONS.

§ 466. Definatory.
467. Creation of reservation.
468. Construction.
469. Certainty an essential.
470. Must be to grantor.
471. Rights of way.
472. Right of flowage—Water privileges.
473. Light and air.
474. Use and occupancy.
475. Reserved rights in the soil.
476. Standing timber.
477. Reserved rights lost by disuse.

§ 466. Definatory. A reservation is technically defined as the creation of a right or interest in land which had no prior existence as such a thing or as part of a thing granted;[1] an exception, on the other hand, being the exclusion of something from the effect or operation of the deed, is always a part of the thing granted.[2] Both a reservation and an exception must be a part of or arise out of that which is granted in the deed; but the difference is that an exception is something taken back or out of the estate then existing and clearly granted, while a reservation is something newly created and issuing out of what is granted.[3] Thus, a right of way may be excepted from

[1] A reservation may extend to almost any right or interest in lands previously owned by the grantor.

[2] To make a valid exception the following matters must concur: (1) The exception must be created by apt words; (2) must be a part of the thing previously described; (3) must be a part of the thing only, and not of all; (4) must be of such a thing as is severable from the demised premises, and not of an inseparable incident; (5) must be of such a thing as he that excepts may have; (6) must be of a particular thing out of a general, and not of a particular thing out of a particular thing; and (7) must be particularly described and set forth. Woodfall, Landl. & Ten. 10; Shep. Touch. 80; Coke Litt. 47b.

[3] Adams v. Morse, 51 Me. 497; Kister v. Reeser, 12 Rep. 377; Hurd v. Curtis, 7 Met. (Mass.) 94. An exception frequently proceeds upon the theory that it is a regrant by the grantee to the grantor of the estate described in the exception; but this view is better adapted to reservations. See discussions in the following cases: Roberts v. Robertson, 53 Vt. 690; Adams v. Morse, 51 Me. 497; and see Marshall v. Trumbull, 28 Conn. 183; Munn v. Worrall, 53 N. Y. 44; McDaniel v. Johns., 45 Miss. 632; Klaer v. Ridgway, 86 Pa. St. 529; Leavitt v. Towle, 8 N. H. 96; Rich v. Zeilsdorff, 22 Wis. 544.

a grant, or it may be reserved at the time of and in the instrument of conveyance; but in the latter case it is the creation of a new right or interest. Both an exception and a reservation must be created by apt words, those employed for the former being "saving and excepting," while for the latter the word "reserving" is sufficient; but the terms are often used indiscriminately, and frequently in conjunction, as "excepting and reserving," etc.; and the difference between the two is so obscure in many cases that it has not been observed.[4] Notwithstanding there is a technical distinction between the terms, yet where "reserving" is used with evident intent to create an exception, effect will be given to it in that sense;[5] and generally, where the rule prevails that the expressed intention of the parties is the controlling consideration in construing a deed, the distinction of the common law between exceptions and reservations is not material.[6]

The two incidents are so nearly allied and partake so largely of the same characteristics that they are best treated in connection with each other, and will be so treated in the succeeding paragraphs.

§ 467. Creation of reservation. Any language clearly indicating intention will usually be given effect as a reservation, although many of the cases hold that if a reservation of inheritance is intended specific words of inheritance must be employed, and that a reservation to the grantor alone will have no greater effect than to confer upon him a life estate.[7] But words of inheritance, so far as they may affect the character of estates conveyed, are no longer necessary in most of the states, and it seems that where the use of such words have been dispensed with by statute in the creation of estates they

[4] Winthrop v. Fairbanks, 41 Me. 307; Bowen v. Conner, 6 Cush. (Mass.) 132; Roberts v. Robertson, 53 Vt. 690.

[5] Sloan v. Lawrence Furnace Co. 29 Ohio St. 568; Kister v. Reeser, 98 Pa. St. 1; and see Barnes v. Burt, 38 Conn. 541; State v. Wilson, 42 Me. 9. As where a grantor sold land reserving the coal therein, it was held to be an exception, making the grantor the separate owner of the coal. Whitaker v. Brown, 46 Pa. St. 197.

[6] Coal Creek Mining Co. v. Heck, 15 Lea (Tenn.) 497; Heflin v. Bingham, 56 Ala. 566; Hart v. Stratton Mills, 54 N. H. 109; Dennis v. Wilson, 107 Mass. 591; Whitaker v. Brown, 46 Pa. St. 197.

[7] Ashcraft v. R. R., 126 Mass. 196.

need not be used in a reservation;[8] and in like manner, if the reservation is such a one as is appurtenant to the land conveyed or to land yet owned by the grantor, words of inheritance need not be used.[9]

The term "reservation" seems to have acquired a wider significance in this country than was accorded to it in England, and also to have lost some of the incidents of the place of its origin. It would seem to have been formerly used mainly with respect to rents or some provision which a grantor made or reserved to himself out of that which was granted. At present, while it still retains this character with respect to leaseholds, it is the form by which an easement, privilege or benefit is acquired by the grantor out of the thing granted, without respect to the character of the estate conveyed.

By the technical rules of conveyancing a reservation is made in the clause following the *habendum* and which is known as the *reddendum*. In formally drawn leases this order is generally observed with respect to the reservation of rent, but in other grants it is not material where the provision is placed, and usually it follows the grant.

§ 468. **Construction.** Where the exceptions and reservations of a deed are expressed in a doubtful manner, the general rule is that they shall be construed most strictly against the grantor;[10] yet if the intention of the parties can be fairly ascertained from the instrument, such intention will govern in its construction.[11] If repugnant to the grant they are void;[12] but generally the intent of the parties, as ascertained by a fair interpretation, must be given effect, and the exception reconciled if reconcilement is possible.[13] The usual rules which

[8] Karmuller v. Krotz, 18 Iowa 358.

[9] Winthrop v. Fairbanks, 41 Me. 309; Burr v. Mills, 21 Wend. (N. Y.) 290.

[10] Duryea v. New York, 62 N. Y. 592; Wiley v. Sidorus, 41 Iowa 224; Klaer v. Ridgway, 86 Pa. St. 529; Gerrish v. Shattuck, 132 Mass. 235; Wyman v. Farrar, 35 Me. 64.

[11] Wiley v. Sidorus, 41 Iowa 224; Hall v. Ionia, 38 Mich. 493; Thompson v. Gregory, 4 Johns. (N. Y.) 81.

[12] As where the exception is as large as the grant itself, or where the excepted part was specifically granted—as where a person grants two acres and then excepts one of them. Cutler v. Tufts, 3 Pick. (Mass.) 272.

[13] Hall v. Ionia, 38 Mich. 493.

govern the construction of grants apply in the same manner to exceptions and reservations.[14]

§ 469. Certainty an essential. It is a general rule, founded on reason and sustained by authority, that the same certainty of description is required in an exception out of a grant or a reservation made therefrom as in the grant itself. The rule is not uniform, however, and in some states seems to be denied. In the cases which sustain the rule the doctrine is announced in strong and generally unqualified terms, which admit of no variation, that where a deed excepts out of the conveyance a specific quantity of land, say an acre, and there is nothing in the exception which serves to locate it upon any particular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.[15] But it seems that in some cases of this character the uncertainty of location may be cured by the grantor's election, followed by acts *in pais*.[16]

On the other hand, there are cases which hold that where a whole tract of land is conveyed by specific designation, excepting therefrom an acre, without describing such acre, the exception or reservation will nevertheless be good, and the owner thereof will become a tenant in common with the owner of the balance of the tract in the proportion that the acre bears to the number of acres in the whole.[17]

[14] Where land was conveyed with all the buildings standing thereon, *except the brick factory*, the land on which the factory stood and the water privilege appurtenant thereto did not pass by the deed. Allen v. Scott, 21 Pick. (Mass.) 25.

[15] Mooney v. Cooledge, 30 Ark. 640.

[16] As where a deed reserved three-quarters of an acre as a burying-ground for the grantor's family, and was followed by interments in a particular place. Benn v. Hatcher, 81 Va. 25.

[17] Gill v. Grand Tower, etc., Co., 92 Ill. 249. In this case the language of the deed was, "All that parcel of land described as . . . fraction section 23, and northwest quarter section 24, town 10 south, range 4 west, except twenty acres, which is reserved to satisfy the claims" of certain heirs therein named. And see Rockafeller v. Arlington, 91 Ill. 375. An exception in a grant of lands in these words, "excepting and reserving out of the said piece of land so much as is necessary for the use of a grist-mill on the east side of the road at the west end of the saw-mill dam," is a good exception; but until the grantor or his assigns exercise the right reserved and build the mill, it is inoperative, and the whole premises vest in the grantee, who may maintain trespass against a stran-

§ 470. **Must be to grantor.** It is a rule that a reservation must be to the grantor and not to a stranger,[18] but it is not the less made to him simply because others can derive advantage from it; and it will be considered as made to him when valuable rights are secured to him, although it may be perceived that others will also be benefited by it.[19]

But while a reservation will not give title to a stranger, it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or "reserved."[20] It must not be understood, however, that the exception in such case gives title to such third person, for no one not a party to the deed can acquire any rights or interest in the land by virtue of any exception therein contained more than a reservation; yet where third parties already possess rights adverse to those conveyed, an exception may properly be made for the purpose of relieving the grantor from liability on his covenants. The exception, in such event, operates as a recognition of the existing rights of such third persons, and serves to convey notice to the grantee.[21]

ger, or even against the grantor or his assigns, for an entry on the land for any purpose other than that specified in the reservation. Dygert v. Matthews, 11 Wend. (N. Y.) 35. In a conveyance of land a right of way was reserved for a portion thereof "from the public highway along the —— side of sub-lot No. —— to the river, not less than —— feet wide." *Held*, that this reservation of the right of way was not void for uncertainty. The parties interested could locate it by agreement, or by acts, conduct and declarations indicating a practical location, accompanied by user from and after the date of the creation of the right of way. Crocker v. Crocker, 5 Hun (N. Y.) 587.

[18] Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73; Littlefield v. Mott, 14 R. I. 288.

[19] Gay v. Walker, 36 Me. 54; Bridger v. Pierson, 45 N. Y. 691; Karmuller v. Krotz, 18 Iowa 358; Barber v. Barber, 33 Conn. 335.

[20] West Point Iron Co. v. Reymert, 45 N. Y. 703. As where a deed from A. to B. contained a clause recognizing the right of C. to a mine by "reserving to C. the right he has to the ore-bed and the right of way to the West Point foundry, as now used." Ibid.

[21] As where a deed with covenants for quiet enjoyment contained the following clause: "Reserving always a right of way, as now used, on the west side of the above-described premises for cattle and carriages, from the public highway to the piece of land now owned by R." *Held*, that, although strictly a *reservation* in a deed is ineffectual to create a right in any person not a party thereto, yet

§ 471. **Rights of way.** One of the most common reservations made in deeds is that of roadways, paths and other easements of a like character covered by the generic term "rights of way." Usually reservations of this kind are construed to create only an easement—the fee, with all its incidents, vesting in the grantee.[22] The only effect of such a reservation, therefore, is to protect the grantor from liability on the covenants of his deed. But where the clause takes the form of an exception from the grant, so that no title in fact as well as in law ever passed to the grantee, the fee as well as the use is included.[23]

Usually, however, courts will incline to construe exceptions as having reference only to the easement and not to the land; and where the exception is of a "road" or of a "highway," and not of the land covered by such road or highway, it may be taken as an exception of the right of passage merely, and therefore be treated simply as a reservation, and the

there being in fact a right of way existing at the time of the grant in R., such clause must be construed as an exception from the property conveyed; and that the grantor was not liable to the grantee as for a breach of his covenant. Bridger v. Pierson, 45 N. Y. 601; and see Richardson v. Palmer, 38 N. H. 212.

[22] Caradine v. Caradine, 33 Miss. 698; Keeler v. Wood, 30 Vt. 242. As where a deed conveyed certain property, "reserving to the public the use of the road through said farm," it was held that the intention of the grantor was to convey to the grantee the lands over which the public highway was laid out, subject only to the right of way of the public over the same. Richardson v. Palmer, 38 N. H. 212. So, a reservation of "a road ten feet wide along the line of Joseph Badger" was held to carry only a right of way and not the fee of the strip. Kister v. Reeser, 98 Pa. St. 1; and see Winthrop v. Fairbanks, 41 Me. 311; Dunn v. Sanford, 51 Conn. 443; Bridger v. Pierson, 45 N. Y. 601. A reservation of "all roads now established and built on or over" premises conveyed by deed relates only to the easement of public travel, and does not except any portion of the soil from the operation of the deed. Capron v. Kingman, 14 Atl. Rep. 868.

[23] An exception in a deed in the following words: "Saving and excepting from the premises hereby conveyed all and so much, and such part and parts thereof, as has or have been lawfully taken for a public road or roads," *held* to be an exception of the land covered by a public highway across the premises, and not simply of the easement therein, and that the fee of such land remained in the grantor and passed to a subsequent purchaser from him. Munn v. Worrall, 53 N. Y. 44; And see Salisbury v. Andrews, 19 Pick. (Mass.) 252.

soil may be regarded as passing to the grantee in the deed.[24] But as a person through whose lands a highway is laid out may convey the land on each side, retaining the fee of the land covered by the roadway,[25] this result will follow where proper and apt words to except such land from the premises conveyed by the general description are inserted in the deed. Hence, if the exception does not purport to be of any particular estate or interest in the land, but is in terms of a certain part and parcel of the premises embraced within the boundaries set forth in the deed, effect must be given to it as such.[26]

It is competent for the parties to agree upon a general reservation and effect, in such cases, will be given to their agreement. Usually, however, reservations are made for specific purposes or with respect to specific things, and the rights thus acquired will continue to subsist only so long as the things shall remain and the specific user is reasonably necessary and convenient for the purpose for which it was created.[27] Thus, a reservation of a right of way to the stables of the vendor will continue only so long as the buildings are used for such purpose, and will cease whenever the specific user ceases.[28]

Where a right of way is not bounded by the grant the law will bound it by the line of reasonable enjoyment, and, it seems, even where specific dimensions are stated, as where the way is over a space twenty feet in width, this does not imply an absolute right to use every part of the twenty feet, but is merely a grant of a convenient way within those limits.[29]

[24] In Peck v. Smith, 1 Conn. 103, which is the leading case in support of this position, the language of the exception was, "saving and excepting the road or highway laid out," etc.; and the court held that the term "highway" or "road" did not necessarily mean the land over which the road passed, and that therefore only the easement was excepted. But in this case there were three dissenting opinions. In Leavitt v. Towle, 8 N. H. 96, the exception was of a "road" laid out through the premises. The court held that "a road" was a right of passage merely, and the soil over which it passed would not be transferred by a conveyance of the road.

[25] Jackson v. Hathaway, 15 Johns. (N. Y.) 447.

[26] Munn v. Worrall, 53 N. Y. 44. Compare Elliott v. Small, 35 Minn. 396.

[27] Bliss v. Greeley, 45 N. Y. 671.

[28] Grafton v. Moir, 130 N. Y. 465.

[29] See Johnson v. Kinnicutt, 2 Cush. (Mass.) 153.

§ 472. **Right of flowage—Water privilege.** Where a grant is made of land bounded on or near a pond or stream, but reserving the mill and water privilege, this is a reservation of the right of flowing the land so far as may be necessary or convenient or so far as it has been usual to flow it for that purpose;[30] and such flowage will not constitute an incumbrance within the meaning of the covenants of the deed.[31]

§ 473. **Light and air.** It is beyond dispute that an existing easement cannot strictly be made the subject either of exception or reservation in a deed or conveyance of land; for it is neither parcel of the land granted, which circumstance is requisite to enable a thing to be excepted, nor does it issue out of the land, as it should to render it capable of being the subject of a reservation. Hence, where an existing easement is incorrectly reserved to a grantor, or excepted from the land conveyed, its legal effect will be to operate as a grant of a newly created privilege or easement by the grantee of the land to the grantor.[32] These principles apply to reservations of light and air; and where a deed contains stipulations for the preservation of the then conditions of buildings standing upon land retained by the grantor, or even with reference to future erections, and provides for the free and unobstructed right of light and air by means of windows overlooking the tract conveyed, such reservation will be construed as a newly created easement of light and air from the vendee's property, and any interference by him which would result in a substantial loss of these privileges will be restrained by injunction.[33]

[30] Pette v. Hawes, 13 Pick. (Mass.) 323.

[31] Pette v. Hawes, 13 Pick. (Mass.) 323.

[32] Rosenkrans v. Snover, 19 N. J. Eq. 420.

[33] A., who was the owner of a strip of land fifty feet wide and two hundred and twenty feet deep, sold the westerly half of that land to B., by a deed which contained the following reservation: "Reserving the right to the free use of the light and air over the tract above described in case he should build on the common line between the parties, and the right to put windows in said building overlooking the tract above described," etc. He afterwards built upon the common line between the lands of B. and himself, and put in his building several windows overlooking B.'s land. B. is about to erect a building on his land that will close two of A.'s windows, and partially close two others. *Held*, that the reservation operates as a grant of a newly-created easement, at least to light and air from B.'s premises,

§ 474. **Use and occupancy.** A reservation of a right to use and occupy the granted premises, either for a stated term of years or for life, is ordinarily created by the employment of those words; and unless there is some special stipulation tending to show that such reserved right of occupancy is personal to the grantor or the person for whom the reservation was created, it will be regarded as a general right with all its ordinary legal incidents.[34] If it is intended to make the reservation personal in its character, limiting the use to the grantor, the language employed should be reasonably clear and explicit to that effect; otherwise no such limitation will attach.[35]

§ 475. **Reserved rights in the soil.** While in a majority of cases reservations or attempted reservations of personal rights in the grantor are made with reference to some specific use in the nature of an easement, yet it not infrequently happens that substantial rights in the soil are also withheld from the grant in this manner. Strictly speaking, these latter would be exceptions and not reservations, yet where the term "reservation" is employed with apparent intent to create an exception, effect will be given to it as such. Among the most common of this class is the right to take minerals. Sometimes the reservation or exception is clearly expressed as to the nature or character of the minerals thus excepted, as coal, stone, iron, etc., but more frequently parties are content with general references; and the word most commonly employed is the general term "minerals." Allusion has been made in other parts of this work to the embarrassment which the employment of this term often occasions, and the difficulty which courts have experienced in placing upon it a proper

and that, if it had been made to appear that the interference with A.'s windows would result in his substantial loss of light and air, he would have been entitled to an injunction. Hagerty v. Lee, 15 Atl. Rep. 399. Compare Wilder v. Wheeldon, 56 Vt. 344.

[34] Cooney v. Hayes, 40 Vt. 478.

[35] Thus, a clause in a deed "reserving to ourselves the right to use and occupy the said granted premises for five years, if we choose to do so for that length of time from the date of this deed; but if we leave the possession and occupancy of said premises before the expiration of said five years, then this reservation shall be at an end and determine, and the grantee shall have full possession thereof," *held* not to be a limitation personal in its nature, but general, and imports the right to

construction when used as a description in a grant. Such an exception would certainly carry veins and beds of ore, and usually deposits of coal and other fossils; while it would not be doing violence to language to permit it to include strata of rocks, chalk or salines, all of which may be obtained by the various processes known as mining. Possibly, and under certain circumstances, it might be made to include clays and other earths. Such an exception, however, has been held not to include gases or earth oils,[36] but the volume of authority now places these products in the category of minerals,[37] and makes them a part of the land while in place, hence it would seem that under a deed excepting or reserving the minerals, natural gas or petroleum oil will not pass.[38]

Exceptions and reservations of this character are frequently so broad as to be repugnant to the grant, though it would seem that great latitude is to be allowed in construction.[39]

An exception of mines, minerals, ore-beds, etc., where the specific thing is taken out of the grant, must be distinguished, however, from the mere reservation of a right to enter and take the same. Thus, a reservation of "the right of mining on the granted premises" a certain quantity of ore annually would operate only as a license to enter and mine; it would give no title to the land or to the ore before it should be mined; nor would it restrict the grantee from mining at the same time, even to the exhaustion of the ore.[40]

A reservation of the right of mining, and incidentally of sinking shafts, etc., also gives to the grantor the right to place buildings on the surface, to use part of the same for a dump,

occupy personally or by tenants. Cooney v. Hayes, 40 Vt. 478.

[36] Durham v. Kirkpatrick, 101 Pa. St. 36; but see Marshall v. Mellon, 179 Pa. St. 371.

[37] Kelly v. Ohio Oil Co., 57 Ohio St. 317; Williamson v. Jones, 39 W. Va. 231.

[38] Murray v. Allred, 100 Tenn. 100.

[39] Thus, a reservation, "excepting and reserving thereout unto A. . . . all and all manner of metals and minerals, substances, coals, ores, fossils, and also all manner of compositions, combinations and compounds of any or all the foregoing substances, and also all valuable earths, clay, stones, paints and substances for the manufacture of paints upon or under the said tract of land," *held* to reserve clay suitable for making bricks; and that the reservation was not to be construed as being as broad as the grant, the grant passing the ordinary glebe, timber and waters. Foster v. Runk, 109 Pa. St. 291.

[40] Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290. It

and generally to do all needful and proper things connected with the exercise of the right.[41]

§ 476. **Standing timber.** A very common example of reservation or exception is presented in many parts of the country where stipulations are inserted in deeds of conveyance with reference to trees or "timber" then growing upon the granted land. Such stipulations are generally intended for exceptions, but their legal effect is more often only that of reservations. In some cases the timber itself is reserved; and the courts hold that this is strictly an exception, since it is a part of the realty or the land, and would have passed to the grantee but for the exception. In such case the property in the timber continues in the grantor, with a right to so much of the soil as is necessary to sustain it.[42] Usually, however, the stipulation only provides for a right to cut and remove the timber—a fixed time being ordinarily named as the limit in which the right is to be exercised. In this event the stipulation does not have the effect to except the wood from the grant, but merely reserves a right to enter, cut and remove it, or so much as the grantor may be able to cut and remove within the time specified in the deed.[43] In case of the neglect of the grantor to cut and remove the timber within the time specified, the reservation would lapse and the estate become absolute in the vendee.[44]

But where, in a deed granting land, the timber thereon is expressly excepted from the grant, the title to the timber remains in the vendor, who, by virtue of the exception, has an implied power to enter, fell and take it away.[45] His title to the timber arising from the exception in the deed is of the same binding force and effect as if the whole estate had been originally granted and a deed had been executed to him from

was held in this case, however, that such a deed might be reformed in equity, for variance through mutual mistake from the previous oral contract of the parties, as being a reservation and not an exception, and therefore not within the statute of frauds.

[41] Wardell v. Watson, 93 Mo. 107.

[42] Howard v. Lincoln, 13 Me. 122; Rich v. Zeilsdorff, 22 Wis. 544; Wait v. Baldwin, 60 Mich. 622.

[43] Pease v. Gibson, 6 Me. 81; Reed v. Merrifield, 10 Met. (Mass.) 155; Martin v. Gilson, 37 Wis. 362.

[44] Rich v. Zeilsdorff, 22 Wis. 544.

[45] Boults v. Mitchell, 15 Pa. St. 371; Pierrepont v. Barnard, 6 N. Y. 279.

his grantee of all the timber upon the land.[46] In such event the right to enter upon the land and cut and remove timber at pleasure would have passed as an incident of the grant and as essential to the enjoyment of the right of property, and the right is equally as well assured in an exception. Such a right, where there are no words showing a limitation of the time of enjoyment or within which it shall be exercised, is not revocable; nor can it be terminated at the will of the owner of the land, nor by notice to remove the timber in a reasonable time. The right does not rest upon the notion of a license from the grantee, but as being connected with the exception as an incident to its enjoyment, and is an interest in the land itself to that extent.[47]

§ 477. **Reserved rights lost by disuse.** A reserved right may be lost by long negligence and disuse; and the presumptions of their release or discharge are favored for the sake of quieting possessions.[48] Thus, reservations in the nature of a right of common, or other easements of like character, may be deemed to have been relinquished where there has been no exercise of the right for a long period of time, particularly where, by a fair construction of the language of the deed, it is apparent that it was not the intention of the parties as expressed by the reservation that the land should always continue subject to the servitude, however appropriated by the owner.[49] Long disuse, in such a case, will let in the presumption of a release or other discharge; and such presumptions are to be favorably received in opposition to dormant claims, because they conduce to the repose of titles and the security of estates.

[46] Wait v. Baldwin, 60 Mich. 622.

[47] Rich v. Zeilsdorff, 22 Wis. 544; Wait v. Baldwin, 60 Mich. 622.

[48] Broeck v. Livingstone, 1 Johns. Ch. (N. Y.) 357.

[49] As, where a deed in fee contained a reservation of the right of "cutting and hewing timber and grazing in the woods not appropriated or fenced in," *held*, that the right reserved ceased as soon as the premises were fenced in by the grantee, especially where it appeared that the premises had been inclosed for about thirty years, and the right during that period had not been claimed or exercised. Broeck v. Livingstone, 1 Johns. Ch. (N. Y.) 357.

CHAPTER XIX.

EXECUTION.

ART. I. GENERALLY CONSIDERED.
ART. II. SIGNING.
ART. III. SEALING.
ART. IV. DELIVERY.

ART. 1. GENERALLY CONSIDERED.

§ 478. Definition.
479. Execution by corporation.
480. Variations and discrepancies.
§ 481. Execution in blank.
482. Attesting witnesses.

§ 478. Definition. The term "execution" primarily means the accomplishment of a thing—the completion of an act or instrument; and in this sense it is used in conveyancing to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument of conveyance, which are: the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee. Acknowledgment is sometimes included in the term, but as a matter of fact the act of acknowledgment is no part of the execution of a deed, which, if in all other respects regular, is perfect and complete without it; nor is the certificate of acknowledgment any part of the deed. The different acts of execution are so essential to each other that neither can be dispensed with; but under the current of modern decisions sealing is perhaps of the least importance, and though this is still an indispensable requisite at law, in equity the deed may be effective without it.

§ 479. Execution by corporation. Practically there is no difference between the deeds of corporations and those of ordinary individuals, and the solemnities attending their execution differ only in the fact that they are necessarily the work of agents. Originally a corporation could speak only by its corporate seal, and by this it authenticated all of its acts;[1]

[1] Thus, Blackstone says: "A corporation being an invisible body cannot manifest its intentions by any personal act or oral dis-

but modern commerce and business methods have greatly changed this rule, and corporations may now act by their agents the same as natural persons. In grants of lands it is still customary to use the corporate seal, but in addition thereto the hand of some of its officers or agents is required, either with or without the affixing of the corporate name.

It is customary and proper to sign a deed with the name of the corporation;[2] but unless this is a special statutory requirement,[3] such a method is not necessary to impart validity,[4] for by common law the common seal is itself the signature of the corporation.[5] The seal, when affixed to a deed or contract by proper authority,[6] is not distinguishable in its legal effect from that of an individual, and renders the instrument a specialty.[7]

It has been held that the president of a corporation has no power as such, without express authorization from the directors, to purchase or sell real property in the name of the corporation, and that an instrument executed by him for such purpose, in the name of the corporation and under its common seal, without the authorization of the directors, may be shown to be void; and further, that a corporation is not estopped

course; it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." 1 Black. Com., 475. And see Brown v. Westerfield, 47 Neb. 399.

[2] Flint v. Clinton Co., 12 N. H. 430; and see Ang. & Ames on Corp. § 225.

[3] See Isham v. Iron Co., 19 Vt. 251.

[4] Osborne v. Tunis, 1 Dutch. (N. J.) 633.

[5] Beckwith v. Windsor Mfg. Co., 14 Conn. 594; Frankfort Bank v. Anderson, 3 A. K. Marsh. (Ky.) 932.

[6] The seal is itself *prima facie* evidence that it was affixed by proper authority. Solomans Lodge v. Montmallin, 58 Ga. 547; Sheehan v. Davis, 17 Ohio St. 571; Lovett v. Saw-mill Ass'n, 6 Paige (N. Y.) 54. And that in affixing such seal and the hands of the officers, such officers did not exceed their authority. Kansas v. R. R. Co., 77 Mo. 185.

[7] Clark v. Mfg. Co., 15 Wend. (N. Y.) 256; Benoist v. Carondelet, 8 Mo. 250. In the absence of the common seal, or of proof of facts whence the authority of the officers of a corporation to execute a conveyance may be inferred, such authority can only be established by resolution of the directors or trustees entered in the proper book

from denying the validity of an unauthorized contract made by its president where it has never availed itself of the benefits of such contract.[8] As a general rule, however, the president of a corporation has power to bind it within the scope of its powers; and as its rules and by-laws are not usually open to public inspection, particularly where the home office is in a distant state, such rules and by-laws can have no appreciable effect upon persons having no knowledge of their existence; and notwithstanding such officer may have no power to make contracts or conveyances under the private rules and regulations of the corporation, yet as to strangers without notice it would be estopped to deny the powers of its officers to perform the specific acts.[9]

§ 480. **Variations and discrepancies.** As deeds are usually drawn by a conveyancer, it will often happen that a variance will occur between the name inserted in the body of the instrument and that affixed by the grantor in execution. One of the most common discrepancies of this character is the omission of all or part of the middle name or initials or the substitution of other middle names. This is but a slight defect, however, for the law knows but one Christian name, and the omission or insertion of a middle name is usually an immaterial circumstance.[10] Discrepancies in the orthography of the name as written by the scrivener and by the parties upon execution are common; but as these matters derive their main importance from the effect they may have upon the title when forming the subject of future sales, and as the subject has already been considered in treating of objections to title, no further allusion will be made to it at this time.

It sometimes happens that, through inadvertence or mis-

of the corporation. Southern Cal. Colony Ass'n v. Bustamente, 52 Cal. 192.

[8] Bliss v. Kaweah, etc., Co., 3 West Coast Rep. (Cal.) 571.

[9] Life Ins. Co. v. White, 106 Ill. 67. A purchaser of land from a corporation, being a stranger to the corporation, is not bound to know that there is a by-law of the company requiring an order of the board of directors to authorize a sale of land owned by the company. The rule is the same where a purchaser receives a bond from a corporation for a deed for land purchased; and he will be entitled to the deed according to the provisions of the bond, notwithstanding there was no order of the board of directors authorizing the sale. Wait v. Smith, 92 Ill. 385.

[10] James v. Stiles, 14 Pet. (U. S.) 322; Dunn v. Gaines, 1 McLean (C.

take, the name of the grantor has been entirely omitted in the body of the deed; and while it has been held that one who signs, seals and delivers a deed is bound by such acts as grantor, although not named as such therein,[11] the current of later decisions would indicate that such a deed is ineffectual to convey any interest or pass title.[12] Where only a portion of the grantors named in a conveyance sign and acknowledge the same, the authorities are somewhat divided as to the effect of the deed—some holding that, where the deed shows that it was intended to be jointly executed by all the parties, an execution and delivery by a portion only is incomplete and does not bind them.[13] A majority of the cases, however, favor the contrary doctrine, and seem to sustain the principle that the parties executing will be bound thereby, and the deed be sufficient to pass their interests.[14]

§ 481. **Execution in blank.** It is axiomatic that to every deed there must be at least two parties, the one capable of conveying and the other of receiving, and that a deed without a grantee is practically no deed at all. The exigencies of modern commerce, aided to some extent by the familiar principles of estoppel, have in a measure and in some localities created an apparent anomalous exception to this rule; and while no court has gone the length of asserting that a deed in blank is operative at the time of its execution, yet the construction of instruments of this character has formed the subject of a number of decisions tending to uphold the same where the grantee's name has been subsequently inserted. Thus, it has been held that one who has signed and acknowledged deeds in blank, and furnished them to an agent to fill the blanks according to such sales as he may make for the grantor, and deliver the deeds to the purchaser, is estopped to deny that a deed filled up and delivered to a purchaser in good faith and for value is a valid deed and conveys title.[15] Upon

Ct.) 321; Erskine v. Davis, 25 Ill. 251; Scofield v. Jennings, 68 Ill. 232.

[11] Elliott v. Sleeper, 2 N. H. 525; Thompson v. Lovrein, 82 Pa. St. 432.

[12] Harrison v. Simmons, 55 Ala. 510; Laughlin v. Fream, 14 W. Va. 322; Peabody v. Hewitt, 52 Me. 33; Bank v. Rice, 4 How. 225.

[13] Arthur v. Anderson, 9 S. C. 234.

[14] Story, Part., § 119; Parsons, Part., § 369.

[15] Pence v. Arbuckle, 22 Minn. 417; Ragsdale v. Robinson, 48 Tex.

this point the courts seem to be mainly united, and though the doctrine has received some dissent the volume of authority fairly establishes the general rule as stated. Such a deed, however, passes no title upon delivery until the blanks are filled by the grantor or his agent by his authority;[16] and it has been held that, if the name of a grantee is afterwards inserted without his authority, such deed will not become sufficient for the purpose of passing the legal title merely from the fact that the grantee enters into possession and pays the purchase price.[17]

It seems the agent of the grantor may insert as grantee, the name of one who has contracted with him after the execution of a deed, upon the grantor's authority;[18] but it would further seem he has no right, even upon request of the grantee whose name he was instructed to insert, to insert instead the name of another;[19] and, while an innocent purchaser will in most instances be protected, a deed so signed may always be avoided, when filled out by one not duly authorized by the grantor, as against a grantee with full knowledge of the facts.[20]

There is another phase of the subject which, while properly falling within the principle under discussion, is nevertheless regarded in a very different light. This occurs in the case of the insertion of some matter having reference to the grantee, usually for the purpose of better identification; and where an attempt has been made to convey to a designated grantee, but for any reason such grantee has been imperfectly described, named or designated, it has been held that the execution of a deed is not invalidated by the insertion of a part of the grantee's name by his attorney after delivery.[21]

The objection that a deed was executed in blank, and the name of the grantee inserted after delivery, can only be made by the grantor or one claiming through or in right of him.[22]

379; Owen v. Perry, 25 Iowa 412; Swartz v. Ballou, 47 Iowa 194; Schintz v. McManny, 33 Wis. 299; McNab v. Young, 81 Ill. 11.

[16] Adamson v. Hartman, 40 Ark. 58.

[17] Dearguello v. Bours, 67 Cal. 447; and see Disen v. Rice, 33 Tex. 139.

[18] Schintz v. McManny, 33 Wis. 299; McNab v. Young, 81 Ill. 11.

[19] Schintz v. McManny, 33 Wis. 299.

[20] Cooper v. Page, 62 Me. 192.

[21] Devin v. Himer, 29 Iowa 297.

[22] McNab v. Young, 81 Ill. 11.

It would seem that the same rules which govern the insertion of the names of grantees in deeds of conveyance executed in blank may also be applied to insertions of subject matter. Hence, where a principal executes and delivers to his agent a deed without description and with instructions to fill same in, the deed will be fully operative as against the grantor when this has been done; and even though the agent exceeds or disobeys his instructions in filling in the blanks, substituting other property than that originally intended, the grantor will still be bound if the grantee was himself without fault and acted in good faith.[23] The principle upon which these rules rest is to place the loss, if there be a loss, upon the person who endowed the agent with apparent authority, and not upon an innocent third person who trusted to such apparent authority, and parted with his money or property in consequence of such trust. It is a principle that has long obtained in transactions relating to negotiable securities, but it seems is equally applicable to real estate sales and conveyances.

§ 482. Attesting witnesses. A deed is fully executed in the proper sense of the term when it has been signed, sealed and delivered. No other acts were required at common law, and the deed was considered complete when this had been accomplished. Attesting witnesses were sometimes employed, but this was only for the purpose of preserving the evidence;[24] they were not considered necessary to give validity to the deed, and proof of the handwriting of the grantor was considered sufficient when the execution of the instrument was called in question.[25] In many of the states the rule of the common law has been retained, and no attesting witnesses are required;[26] in others a witness or witnesses are necessary where the deed has not been acknowledged,[27] or to make proof of deed;[28] while in others a peremptory mandate of the

[23] Nelson v. McDonald, 80 Wis. 605.

[24] 2 Black. Com. 307.

[25] See Meuley v. Zeigler, 23 Tex. 88; Thacher v. Phinney, 7 Allen (Mass.) 149; 1 Wood's Conv. 239.

[26] Such is the case in California, Dakota, Illinois, Indiana, Iowa, Kansas (except to prove deed), Maine, Massachusetts, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas and West Virginia.

[27] As in Alabama, Idaho, Kentucky, Montana, North Carolina, Tennessee, Texas, Virginia and West Virginia.

[28] All of the above and Kansas.

statute requires one or more witnesses to impart legal validity to the conveyance.[29]

With respect to the method in which an attesting witness should evidence that fact, it does not seem that the rules are any different from those which govern the affixing of the grantor's signature; hence it has been held that a person who cannot write, but who makes his mark or uses any other device by which he or others may identify him with the transaction, is a competent attesting witness to the execution of a deed.[30]

A deed attested by subscribing witnesses will be presumed to have been duly witnessed;[31] and if it has been duly acknowledged, although there appears to have been subscribing witnesses, it is not necessary to call them for the purpose of proving its execution.[32] In the absence of acknowledgment subscribing witnesses are material, whenever the deed is called in question, for the purpose of proving execution; and in such event the testimony of the witness authenticating his own signature is usually all that is required.[33]

[29] This is the law in Arkansas, Connecticut, Delaware (one witness), Florida, Georgia, Louisiana, Maryland (one witness), Michigan, Minnesota, Mississippi (one or more), Nebraska (one witness), New Hampshire, New York (one), Ohio, Oregon, South Carolina, Utah (one), Vermont, Wisconsin.

[30] Tatom v. White, 95 N. C. 453.

[31] Hrouska v. Janke, 66 Wis. 252.

[32] Simmons v. Haven, 101 N. Y. 427.

[33] In Russell v. Coffin, 8 Pick. (Mass.) it was held that the execution of a deed was sufficiently proved for the purpose of reading it in evidence, where one of two witnesses deposed that he knew the attestation to be in his handwriting, though he did not recollect witnessing it, and that he thought the signature of the other witness, who was out of the commonwealth, was the handwriting of such absent witness.

Article II. Signing.

§ 483. General principles.
484. Method of signing.
485. Signature by mark.

§ 483. General principles. While all of the different acts of execution are to a greater or less extent necessary to the validity of a deed, yet it derives its main efficacy from the signature; for an unsigned instrument, though duly attested, acknowledged and delivered, is a nullity.[1] There are decisions in some localities which seem in a measure to militate against this doctrine, and to indicate that a deed is not necessarily void because the grantor's name is not subscribed to it, provided it is written in his own handwriting, and so placed in the body of the deed as to control the grant.[2] The question in such case becomes one of intention, and may be considered by a jury in connection with other circumstances. The principle, however, is not affected by these decisions, and all the authorities concur that a signing of some sort is absolutely necessary to impart vitality to a grant by deed.

By the old rules of the common law a signature was not considered essential to the validity of a deed, the seal being sufficient to show assent and execution. This was doubtless occasioned by reason of the very general inability of the mass of the people to read or write,[3] and the importance which was formerly attached to seals as the signets of their owners.[4] It would seem, however, that under the Saxon rule signing was

[1] Goodman v. Randall, 44 Conn. 325; Jones v. Gurlie, 61 Miss. 423.

[2] Saunders v. Hackney, 10 Lea (Tenn.) 194.

[3] See 1 Reeve's Hist. Eng. Law, 184.

[4] For many years the use of the pen was practically unknown both to prince and peasant; but few could read and still less could write, yet at a very early day the efficacy of sealing and signing was recognized in legal transactions involving the execution of instruments and it would seem that when a king's hand was necessary to the execution of a charter, grant or treaty, he simply smeared his right hand with ink, and, making his impression upon the parchment, said, "Witness my hand," and execution was complete. Later the ancient seal, then usually set in a finger ring, was again brought into use, and this was impressed instead of the hand, but oftener be-

in general use, provided the parties were able to write, and whether they could write or not it was customary to affix the sign of the cross; but on the Norman conquest waxen seals, usually of specific device, were introduced and took the place of the Saxon method of signing by writing the name and making the sign of the cross.

By the statute of 29 Charles II., for the prevention of frauds and perjuries, all transfers of land were required to be put in writing and signed by the parties making the same; and this statute is the foundation of all the American laws upon the same topic.[5]

§ 484. Method of signing. While the law is strenuous in its demands that the deed of a grantor must be attested by his signature, it is equally lenient as to the method by which such signature shall be applied. Thus, the deed may be signed by the grantor himself or by some other person acting for him. In the latter event the person so assuming to act must, of course, have a proper authorization so to do; and this authority must be of a character equal in dignity to the instrument to which the principal's name is appended. In case of a deed, being an instrument under seal, the authorization must itself be under seal.

But to the rule last stated an important exception has been made in many states, by which, if the name of the grantor is affixed by some other person, at his request and in his presence, such a signing is made as effectual for all intents and purposes as though it had been the grantor's personal act.[6] It is contended in support of this doctrine that the disposing capacity and the act of the mind are the only essential and efficient ingredients which go to constitute the act of grant. Hence, if these are present, though the name be written by another hand, yet, if in the presence and at the request of the grantor, it is his act. The simple fact that, through inca-

side the hand; and from the latter we derive the phrase "Witness my hand and seal."

[5] In Blackstone's time signing does not seem to have been essential, although he says (1 Com. 305): "It is said to be requisite that the party whose deed it is should seal, and now, in most cases, I apprehend, should sign it also."

[6] Gardner v. Gardner, 5 Cush. (Mass.) 483; Frost v. Deering, 21 Me. 156; Goodell v. Bates, 14 R. I. 65; Jansen v. Cahill, 22 Cal. 563; Conlan v. Grace, 36 Minn. 276; Lewis v. Watson, 98 Ala. 479.

pacity, or weakness, or any other reason, the grantor uses the hands of another instead of his own to do the physical acts of making a written sign is of no consequence, and the signing is as much his act as if he held the pen and his hand was guided by another. To hold otherwise, it is said, would be to decide that a person having a full mind and clear capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal.[7] In opposition to this doctrine there are a few cases which have arisen in the construction of local statutes;[8] but the entire current of modern authority is in support of the rule that a deed is properly and sufficiently signed where the grantor's name is affixed by another, if done at his request and in his presence, and the question of physical incapacity is immaterial.[9]

A still further exception has been made in some states, where a signature, though subscribed by another hand and in the absence of the grantor, is nevertheless subsequently recognized and adopted by the grantor as his own;[10] and a person who appears before a magistrate and duly acknowledges the execution of a deed to which his name has been appended by another in his absence is held to recognize and adopt such signature.[11] A deed so ratified has been held to be valid and effectual for all purposes.[12]

§ 485. Signature by mark. As the true meaning of a signature is to evidence the disposing purpose of the grantor, it follows that any act of his plainly evincing intention will be binding upon him; and while his name appended by his own hand is the highest and best evidence of such intention, yet any other unequivocal act done or directed by him will be

[7] Gardner v. Gardner, 5 Cush. (Mass.) 483; Life Ins. Co. v. Brown, 30 N. J. Eq. 193; and see Bartlett v. Drake, 100 Mass. 174; Forsyth v. Day, 46 Me. 176.

[8] See Wallace v. McCullough, 1 Rich. Eq. (S. C.) 426.

[9] If a grantor acknowledges and delivers a deed to which his name has been affixed by the grantee the deed is valid. Clough v. Clough, 73 Me. 487.

[10] Greenfield Bank v. Crafts, 4 Allen (Mass.) 447; Bartlett v. Drake, 100 Mass. 174; Forsyth v. Day, 46 Me. 176.

[11] Bartlett v. Drake, 100 Mass. 174; Lewis v. Watson, 98 Ala. 479.

[12] White v. Graves, 107 Mass. 328.

equally effective. Hence it is that a person physically unable or too illiterate to write his name may sign by any arbitrary symbol—a cross,[13] a crooked line, or any other device intended by him as a sign-manual; and the adoption of such mark or device, if the deed is in other respects regular, will be as effective to transfer the estate as if his name had been written thereon in full by himself.[14] A grantor's mark may be made by himself, or by merely touching the pen in the hands of another.[15]

A grantor may sign by a mark, even though able to write; and instances are frequent where parties have resorted to a mark as the result of temporary causes, difficulty in writing, or other reasons, and not from inability to write. The only serious consequence arising from such a practice is the apparent want of identity where a mark is used in one case and a written signature in another; but this is but a slight circumstance where both instruments are properly acknowledged.[16]

It is customary and proper to write the words "his mark" over or near the device made or adopted by the marksman, yet this is not essential; it is sufficient in every case if it appears that he in fact made the mark or adopted it.[17]

[13] It was a custom among the early Britons, prior to the Norman conquest, to authenticate all important documents with a signature preceded by the sign of the cross. Those who could not write simply affixed the cross. Indeed, it is said that Caedwalla, one of the Saxon kings, at the end of one of his charters, honestly and frankly says, "With my proper hand I have made and subscribed the sign of the sacred cross, on account of my ignorance of letters;" and for this he had the royal precedents of the Emperor Justin I. (Byzantine A. D. 450-527) and of King Theodoric of Italy (A. D. 455-526), who had done the same thing, in the same way and for the same reason. From this ancient custom of preceding the signature by the sign of the cross comes the modern practice of making a "mark" in that form by those who are unable to write.

[14] Truman v. Love, 14 Ohio St. 144; Life Ins. Co. v. Brown, 30 N. J. Eq. 193; Sellers v. Sellers, 98 N. C. 13.

[15] Harris v. Harris, 59 Cal. 620.

[16] Mackay v. Easton, 19 Wall. (U. S.) 619.

[17] Sellers v. Sellers, 98 N. C. 13.

Article III. Sealing.

§ 486. General views—Definition.
487. Necessity of seal.
488. Method of sealing.
489. Omission of seal.

§ 486. General views—Definition. A seal, as defined by all of the earlier commentators and legal lexicographers, is "an impression upon wax, wafer or some other tenacious substance capable of being impressed." Originally wax was exclusively employed for this purpose,[1] which subsequently became in a measure supplanted by a composite wafer having the same general characteristics. At the present time neither wax nor wafer is in general use, as paper has been found to possess all the essential qualities of both of these articles, and to be fully as capable of being impressed by the devices now in common use. The convenience of wax was its first and only recommendation; but as it is the impression and not the wax which constitutes the seal, any other adhesive substance capable of receiving an impression is held to come within the definition.[2]

But while any impression is good as a common-law seal, the general disuse of private seals has led to the substitution of other methods to indicate the fact of sealing; and courts, conforming to the changed conditions of the people, have relaxed the ancient rules in this respect. A piece of colored paper

[1] It would seem that in England the wax originally employed was white but subsequently, when various colors were introduced, the king alone was entitled to seal in red, and from this circumstance comes the traditional use of red in the seals of courts and departments of government.

[2] Pillow v. Roberts, 13 How. (U. S.) 473; Carter v. Burley, 9 N. H. 558. Although the custom of using a seal seems to have prevailed in oriental nations from the most remote antiquity down to the present time, yet this method of authenticating contracts and writings appears to have been almost unknown in England prior to the conquest. Under the Anglo-Saxon governments, contracts, written declarations and memorials were solemnly ratified with the sign of the cross in the presence of numerous witnesses, and derived all their force and efficacy from their publicity. The general practice of sealing was introduced and brought into use by the Normans after the conquest, who caused the ancient Saxon contracts and writings to be sealed with waxen seals in the

apparently affixed as a seal, but without impression or device of any kind, has been held to be a sufficient sealing.[3] So, also, a direct impression on the paper which contains the writing is now regarded as a good and sufficient seal; while it is a common provision in the statutes of many states that every instrument to which the maker affixes a scroll by way of seal shall be of the same force and obligation as if it were actually sealed, provided the maker shall in the instrument recognize such scroll as having been affixed for such purpose.[4]

It may be stated, however, that the world has outgrown the necessities of an age when men affixed their seals because they could not write. What then, from necessity, attested the very act of execution and the genuineness of it, is now but a mere arbitrary form, preserved only as a technical requirement in support of the long-established distinction between writings "under seal" and those which are not.[5] A seal does not in any way affect the substance of the instrument or add to or detract from the obligation which it purports, and in a number of states its use has been discontinued. But in those states where the distinction between sealed and unsealed instruments has been preserved, while the law has become relaxed in favor of custom and convenience in doing business, yet this relaxation is confined to the manner of making the seal only. Sealing and delivery is still the criterion of a specialty.

§ 487. **Necessity of a seal.** Notwithstanding that sealing has now become a matter of minor importance, both as to the seal itself and the method of its affixment, yet, except where it has been expressly dispensed with by law, it is still one of

presence of witnesses, and gave them the names of charters or deeds.

[3] Turner v. Field, 44 Mo. 382. This is a very instructive case on this subject and contains some very ingenious arguments; as, for instance, the court holds that inasmuch as the colored paper, which was applied to a wafer and caused to adhere, must from a physical necessity have made an impression, such impression would be sufficient to comply with the technical requirement of law.

[4] See Haseltine v. Donahue, 42 Wis. 576; Hudson v. Poindexter, 42 Miss. 304; Glasscock v. Glasscock, 8 Me. 577; Cummins v. Woodruff, 5 Ark. 116; Carter v. Penn. 4 Ala. 140; Flemming v. Powell, 2 Tex. 225.

[5] The reasoning of the old law writers was, that a seal attracts attention and excites caution in illiterate persons and thereby op-

the essential acts of execution. It is immaterial how the parties may express the act, whether by a device on wax or wafer, or an impression on the paper, or simply an arbitrary mark with the pen upon the *loci sigillum,* provided it is intended for a seal, and to give effect to the writing as a sealed instrument. It is the seal, however, which imparts special character to the conveyance, and makes it in fact a deed.[6] But while a paper purporting to be a deed may not be valid for the purpose of conveying title unless it is under seal, yet it seems that when a person enters into possession under such a paper, it is admissible in evidence for the purpose of showing the extent of his possession, and what he claims by his possession.[7]

In a number of states seals, except to authenticate the acts of corporations and ministerial officers, have been dispensed with;[8] while in those states in which a seal is still required to deeds of conveyance the old doctrine in relation to their use has been greatly relaxed.

Nor is it essential, in case of more than one grantor, that every person signing the deed shall also formally seal it; and a neglect in this particular will not have the effect to vitiate the deed, provided there is evidence of an intention to seal. In such case the grantor neglecting to seal is presumed to have adopted any seal or scrawl that may be annexed to the name of one of his co-signers.

§ 488. **Method of sealing.** Wax has long since fallen into disuse even in the execution of documents of the highest character, while the old-time "signet" is preserved only as a memento of the past, the same as any other interesting relic of a by-gone age. The mass of the people have no distinctive devices by way of seals which they may use by hereditary right, and few have cared to adopt such devices. Nor is any attempt ever made to fulfill the common-law condition that a

erates as a security against fraud.

[6] Taylor v. Morton, 5 Dana (Ky.) 365; Alexander v. Polk, 39 Miss. 737; Taylor v. Glaser, 2 S. & R. (Pa.) 502; and see McCabe v. Hunter, 7 Mo. 355; Jackson v. Wood, 12 Johns. (N. Y.) 242; Floyd v. Ricks, 14 Ark. 286; Underwood v. Campbell, 14 N. H. 393.

[7] Barger v. Hobbs, 67 Ill. 592.

[8] Seals are no longer required in Alabama, Arkansas, California, Dakota, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Tennessee and Texas.

seal must be an "impression;" while the statute has practically abrogated the last vestige of common-law private seals by declaring that a "scrawl" or "scroll" shall be of the same effect and obligation as a seal whenever it appears from the body of the instrument, the scrawl itself, or the place where it is affixed, that such scrawl was intended for a seal. The word "seal" at the end of the grantor's signature, the letters "L. S.," or any other device manifesting intent, will have the same effect; and generally an instrument will be treated as sealed where evidence of the intent to affix a seal is clear.[9]

As to what shall be considered a "scroll," there is no rule or precise definition. It may consist of a mere outline without any inclosure; may have a light ground or a dark one; may be in the form of a circle, an ellipse or an irregular figure; or it may be a simple dash or flourish of the pen. Its precise form cannot be defined, and in each case depends wholly upon the taste or fancy of the person who makes it.[10]

It is customary and proper to recite that the grantor has affixed his seal, and a well-informed conveyancer will always insert such a recital in the *testimonium* clause. While the attestation clause usually consists of the words "signed and sealed," yet it is not necessary to state in the deed or in the witnessing clause that the grantor has affixed his seal, in order to make a scrawl a seal, if it is apparent from the instrument and the circumstances under which it was executed that it was intended to adopt the scrawl as a seal;[11] and where a scrawl is allowed for a seal, a writing having the word "seal" against the maker's signature is a sealed instrument—the word "seal" in such a case being equivalent to a scrawl.[12]

[9] Burton v. Le Roy, 5 Sawyer (C. Ct.) 510; McCarley v. Supervisors, 58 Miss. 483; Groner v. Smith, 49 Mo. 318; Lewis v. Overby, 28 Gratt. (Va.) 627; Hudson v. Poindexter, 42 Miss. 304. But not merely because it contains a recital that it is sealed. McCarley v. Supervisors, 58 Miss. 483. A scrawl is sufficient in the states of Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Virginia, West Virginia and Wisconsin, and in the territories generally. It would seem, however, that in Maine, Massachusetts, New Hampshire, New York, Rhode Island, South Carolina and Vermont a common-law seal is still required.

[10] See Long v. Ramsey, 1 S. & R. (Pa.) 72.

[11] Burton v. Le Roy, 5 Sawyer (C. Ct.) 510. In this case a scroll made with a pen inclosing the letters "L. S." was held to be a seal.

[12] Lewis v. Overby, 28 Gratt. (Va.) 627.

Notwithstanding that the instrument usually recites that the grantor or person executing has affixed *his* seal, it very rarely happens that the party executing seals the writing with his own hands or with his own seal, the wafer or scrawl being usually appended by the scrivener as part of the clerical labor of preparing the deed.

It would seem, therefore, that the method of sealing is wholly immaterial, provided the deed purports to be a sealed instrument, and affords evidence that it was executed and delivered as such; and usually, although not technically under seal, if it is otherwise in form it will at least be sufficient to convey an equitable title, and, if recorded, affect those interested with constructive notice of its contents as fully as if sealed.[13]

It has been held that where the record, made at a time and under a law permitting the registration only of sealed instruments, showed an instrument in form a proper deed, the conclusion, attestation and certificate of acknowledgment all speaking of it as under seal, it will be presumed that the original was sealed;[14] and generally, where a deed has been duly recorded, the existence of the seal to the original will be presumed from the statements in the concluding clause of the instrument that the grantor affixed thereto his seal, and in the attestation clause that the instrument was sealed in the presence of the witnesses;[15] and whether or not it was the legal duty of the recorder to indicate upon the record whether the instrument was sealed, his omission to do so will not overcome the presumption.[16]

§ 489. **Omission to seal.** A deed without a seal is technically defective, yet not so much so as to render it nugatory; for the rule is well settled that a defective conveyance is still sufficient to bind the lands conveyed in the hands of the grantor and his heirs, and that equity will interpose for the relief of a vendee who has taken under a defective conveyance, and compel the grantor and all who claim under him through operation of law, as well as subsequent purchasers

[13] Grandin v. Hernandez, 29 Hun (N. Y.) 399.

[14] Starkweather v. Martin, 28 Mich. 471.

[15] Le Franc v. Richmond, 5 Sawyer (C. Ct.) 601.

[16] Starkweather v. Martin, 28 Mich. 471.

with notice, to make good the title.[17] Such an instrument would not in many cases be allowed to operate as a deed, but it would in all cases be construed as a valid written contract conveying an equitable title;[18] and where it appears that the seal was omitted by mistake, or where a plain intent to affix a seal is manifest, it has been held that a court of equity, in order to carry out the intention of the grantor, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law.[19]

[17] Mastin v. Halley, 61 Mo. 199.

[18] Brinkley v. Bethel, 9 Heisk. (Tenn.) 789.

[19] Bernard's Township v. Stebbins, 109 U. S. 349; Montville v. Haughton, 7 Conn. 543; Green v. R. R. Co. 12 N. J. Eq. 165; Rutland v. Paige, 24 Vt. 181; McCarley v. Supervisors, 58 Miss. 486.

Article IV. Delivery.

§ 490. General principles.
491. Theory of delivery.
492. Intention the vital principle of delivery.
493. Presumption of time of delivery.
494. Presumption from recording.
495. Presumption from possession of instrument.
496. Presumptions in case of voluntary deeds.
497. No presumption from execution.
§ 498. Sufficiency of proof of delivery.
499. Delivery to infant.
500. Delivery to third person.
501. Delivery to take effect after death of grantor.
502. Continued — Testamentary deeds.
503. Deed retained by grantor.
504. When grantor will be estopped.
505. Revocation and redelivery.
506. Delivery in escrow.
507. Acceptance.

§ 490. General principles. It is a fundamental rule, established and confirmed by the entire current of ancient and modern authority, that to constitute a valid transfer of the title to land by grant there must be a delivery of the deed or instrument purporting to convey the same.[1] That is, the deed must pass from the grantor to the grantee, or to some third person for him, in such a manner as to preclude the grantor from recalling same and with the intent that it shall presently operate as a transfer of the grantor's rights. This is regarded as the final act which consummates and confirms the conveyance, without which all other formalities are ineffectual;[2] and though a deed may be duly executed, and in all other respects perfect, yet, while remaining undelivered in the hands or under the control of the grantor, it passes no title.[3]

[1] Mitchell v. Bartlett, 51 N. Y. 447; Stiles v. Brown, 16 Vt. 563; Tisher v. Beckwith, 30 Wis. 55; Oliver v. Stone, 24 Ga. 63; Armstrong v. Stovall, 26 Miss. 275; Overmann v. Kerr, 17 Iowa 486; Rountree v. Little, 54 Ill. 323; Cannon v. Cannon, 26 N. J. Eq. 316; Jones v. Jones, 9 Conn. 111; Critchfield v. Critchfield, 24 Pa. St. 100; Barr v. Schroeder, 32 Cal. 610.

[2] Williams v. Baker, 71 Pa. St. 476; Borland v. Walrath, 33 Iowa 130; Howland v. Blake, 97 U. S. 624; Brown v. Brown, 66 Me. 316; Tisher v. Beckwith, 30 Wis. 55; Cook v. Brown, 34 N. H. 476; Fisher v. Hall, 41 N. Y. 421; Hoboken Bank v. Phelps, 34 Conn. 103; Porter v. Woodhouse, 59 Conn. 568.

[3] Byars v. Spencer, 101 Ill. 427; Egery v. Woodard, 56 Me. 45;

To impart validity there must be a manifestation, either by act or declaration, of an intention on the part of the grantor to give, and a reciprocal intention on the part of the grantee to take, and it is only by the joint concurrence of these intentions that the devolution of title becomes complete.[4]

Yet though delivery is essentially a solemn observance it is by no means a formal one,[5] and no particular act or set phrase of speech is necessary to constitute a legal transfer. A valid delivery may be effected by simply handing the instrument to the grantee,[6] or to some third person for him,[7] or it may be legally delivered without being actually handed over, provided by declaration or other act it may be inferred that the grantor intended to part with the title;[8] and if once delivered its retention by the grantor will not invalidate the conveyance nor affect the title of the grantee.[9] A delivery will be presumed where the deed has been left by the grantor with the proper officer for record,[10] or may be inferred from the fact that it is found in the possession of the grantee, unattended by any controlling circumstances to the contrary;[11]

Fisher v. Hall, 41 N. Y. 416; Burton v. Boyd, 7 Kan. 17; Duer v. James, 42 Md. 492; but see Wall v. Wall, 30 Miss. 91; Prutsman v. Baker, 30 Wis. 644; Alsop v. Swathel, 7 Conn. 503.

[4] Cline v. Jones, 111 Ill. 563; Bears v. Spencer, 101 Ill. 433; Woodbury v. Fisher, 20 Ind. 388; Parker v. Hill, 8 Met. (Mass.) 447; Parmlee v. Simpson, 5 Wall. (U. S.) 81; Eames v. Phipps, 12 Johns. (N. Y.) 418; Bullitt v. Taylor, 34 Miss. 708; Rittenmaster v. Brisbane, 19 Cal. 371.

[5] The ordinary and simplest mode of delivery is the actual tradition or manual transfer of the instrument from the grantor to the grantee for the purpose and with the intention of passing the title from the former to the latter, and of relinquishing all power and control over the instrument itself. But the actual passing of the deed from the hands of the one to the other is not absolutely essential in any case. Weber v. Christen, 121 Ill. 91.

[6] Bogie v. Bogie, 35 Wis. 659.

[7] Henrichsen v. Hodgen, 67 Ill. 179; Stephens v. Rinehart, 72 Pa. St. 434; Brown v. Brown, 66 Me. 316; Hinson v. Bailey, 73 Iowa 544; Hamilton v. Armstrong, 120 Mo. 597.

[8] Tallman v. Cooke, 39 Iowa 402; Walker v. Walker, 42 Ill. 311; Martin v. Flaherty, 13 Mont. 96; Compton v. White, 86 Mich. 33; Fisher v. Hall, 41 N. Y. 416.

[9] Wallace v. Berdell, 97 N. Y. 13; Burkholder v. Cased, 47 Ind. 418; Albert v. Burbank, 25 N. J. Eq. 404; Thomas v. Groesbeck, 40 Tex. 530; Reed v. Douthit, 62 Ill. 348.

[10] Himes v. Keighblinger, 14 Ill. 469; Counard v. Calgan, 55 Iowa 538; Mallett v. Page, 8 Ohio St. 367.

[11] Newlin v. Beard, 6 W. Va. 110; Brittain v. Work, 13 Neb. 347.

and, generally, anything done by the grantor from which it is apparent that a delivery was intended, either words or acts or both combined, is sufficient.[12]

To the foregoing general rule there is, however, one exception, and this occurs in the case of conveyances of original title by the state or general governments. In such instances, unlike conveyances between individuals, a formal delivery of the patent is not essential to its validity, nor will the non-delivery defeat the grant. When a patent has been duly executed and recorded in the general land office, it becomes a solemn public act of the government and needs no further delivery to make it perfect and valid, and the title to the land conveyed passes by matter of record to the grantee.[13] Nor is it necessary in such case that there should be a formal acceptance on the part of the grantee, for the acts required to be done by him in the preparation of his claim are equivalent to a positive demand for the patent; and although no one can be compelled by the government, any more than by an individual, to become a purchaser, or even to take a gift, yet, where there is no dissent, the assent and acceptance of the patentee are always presumed from the beneficial nature of the grant.[14]

Where no place is fixed for the delivery of the deed by the articles of agreement, the vendor is bound to seek the vendee and make a tender, or, if the vendee appoint a place, the vendor may tender it there.[15]

§ 491. The theory of delivery. No small degree of the importance attached to the delivery of the deed in modern conveyancing arises from the fact that the deed has taken the

[12] Burkholder v. Cased, 47 Ind. 418; Tallman v. Cooke, 39 Iowa 402; Duer v. James, 42 Md. 492; Warren v. Sweet, 31 N. H. 332; Brown v. Brown, 66 Me. 316; Thatcher v. St. Andrew's Church, 37 Mich. 264; Cannon v. Cannon, 26 N. J. Eq. 316; Hatch v. Hatch, 9 Mass. 309; Rivard v. Walter, 39 Ill. 415; Mitchell v. Ryan, 3 Ohio St. 377.

[13] United States v. Schurz, 102 U. S. 378; Le Roy v. Jamison, 3 Saw. (C. Ct.) 369; Houghton v. Hardenberg, 53 Cal. 181; Gilmore v. Sapp, 100 Ill. 279.

[14] Le Roy v. Jamison, 3 Saw. (C. Ct.) 369; Green v. Liter, 8 Cranch (U. S.) 247; Gilmore v. Sapp, 100 Ill. 279; Pierre Mutelle Case, 3 Op. Atty.-Gen. 654; and see Warvelle on Abstracts of Title, 127, for an exposition of the doctrine of governmental grants.

[15] Fanchot v. Leach, 6 Cow. (N. Y.) 506.

place of the ancient livery of seizin in feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investure of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of turf, or any other equally symbolical act, became sufficient. When all this passed away, and the creation and transfer of estates by a written instrument called the act or deed of the party became the usual mode, the instrument was at first delivered on the land in lieu of livery of seizin,[16] until finally any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title.[17]

§ 492. Intention the vital principle of delivery. The question of the delivery of a deed is always one of intention;[18] and the mere fact that an instrument of conveyance has passed from the hands of the owner of the property to the party named therein as grantee does not in itself constitute or establish a delivery.[19] There must exist as well the intention to convey,[20] and this intention seasonably manifested must always control. So again, the simple fact that the instrument still remains in the possession of the grantor does not necessarily imply that there has not been a delivery, for here, as in the former case, the question of intent comes in to govern; and where the circumstances show unmistakably that the grantor intended to divest himself of title and to invest the same in the grantee the delivery will still be complete.[21] Indeed, anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual will constitute

[16] Shep. Touch. 64; Coke on Litt. 266b.

[17] Church v. Gilman, 15 Wend. 656; Warren v. Levitt, 11 Foster (N. H.) 340; Hatch v. Hatch, 9 Mass. 306.

[18] Walker v. Walker, 42 Ill. 311; Nicol v. Davidson, 3 Tenn. Ch. 547; Gregory v. Walker, 38 Ala. 26; Somers v. Pumphrey, 24 Ind. 231; Rogers v. Cary, 47 Mo. 235; Duer v. James, 42 Md. 492; Ruckman v. Ruckman, 32 N. J. Eq. 259; Hastings v. Vaughn, 5 Cal. 315; Martin v. Flaherty, 13 Mont. 96.

[19] Henry v. Carson, 96 Ind. 412; Jordan v. Davis, 108 Ill. 336; Wilson v. Wilson, 158 Ill. 567.

[20] Wilson v. Wilson, 158 Ill. 567.

[21] Ruckman v. Ruckman, 32 N. J. Eq. 259; Scrugham v. Wood, 15 Wend. (N. Y.) 545; McLure v. Colclough, 17 Ala. 96; Otis v. Spencer, 102 Ill. 622.

a sufficient delivery even though retained by neither party to it.[22]

Act and intention are the two elements or conditions essential to a delivery of a deed. The act may be a manual transfer of the instrument, with or without accompanying words, or it may be a purely verbal act, as when the grantee is simply directed to go and get the deed already prepared for him; but it is the intention which gives vitality to the act, whatever that may be.[23] The crucial test in all cases is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done; and this intent is to be gathered from the conduct of the parties, particularly of the grantor, and all the surrounding circumstances.[24]

§ 493. Presumption of time of delivery. It is not customary to insert in the draft of a deed the time of its delivery; and this essential point has, from necessity, been made to depend largely on presumption. Ordinarily a deed will be presumed to have been delivered on the day of its date,[25] or,

[22] As where a deed has been properly signed, sealed, attested and acknowledged in the presence of both parties and the certifying officer, and then left by the grantor with such officer and never called for (Jamison v. Craven, 4 Del. Ch. 311), or where a grantee to whom and in whose presence a deed had been made directed the notary who drew it to send it to the recorder for registration, but the notary put the deed in his safe and forgot about it (Adams v. Ryan, 61 Iowa 733), *held* good deliveries on the day the deeds were made. So, too, where the grantor in a deed lying in the presence of the parties to it, with the intention of passing the estate and of divesting himself of all power over the instrument itself, directs the grantee to take possession of it, and the latter signifies his assent, the delivery will be complete without either party actually touching the deed. Weber v. Christen, 121 Ill. 91. And see Jackson v. Sheldon, 22 Me. 569; Walker v. Walker, 42 Ill. 311; Armstrong v. Stovall, 26 Miss. 275; Burkholder v. Casad, 47 Ind. 418; Dayton v. Newman, 19 Pa. St. 194; Martin v. Flaherty, 13 Mont. 96; Woodward v. Comp. 22 Conn. 459; Rosseau v. Bleau, 131 N. Y. 177.

[23] Cline v. Jones, 111 Ill. 563; Ruckman v. Ruckman, 32 N. J. Eq. 259; Warren v. Swett, 31 N. H. 332; Stevens v. Hatch, 6 Minn. 64; Porter v. Woodhouse, 59 Conn. 568.

[24] Weber v. Christen, 121 Ill. 91, where a deed executed to a bank was handed by the notary to one of the directors, who was instructed by the grantor that the deed was not to be delivered to the bank until certain disputes between grantee and grantor were settled. *Held*, that there was no delivery. Healdsburg v. Bailbachi, 65 Cal. 327.

[25] Billings v. Stark, 15 Fla. 297;

in the absence of any date, at the time of its acknowledgment. This presumption, however, is one of convenience only—it is never conclusive,[26] and the true date of delivery may always be shown by evidence *aliunde*,[27] the testimony of a single witness being sufficient for this purpose.

It has been held that, where the date of the acknowledgment is subsequent to the date given in the body of the deed, there is no presumption of delivery prior to the acknowledgment;[28] and it is not to be denied that such decisions rest upon plausible grounds, but the volume of authority does not sustain this doctrine. The date of execution, therefore, in the absence of other proof to the contrary, and except where controlled by local decisions, may still be taken as the true date of delivery, and not the date of acknowledgment, which, as a matter of convenience, may well have been made afterwards.[29] An acknowledgment subsequent to the date of the deed is not inconsistent with the theory of a prior delivery,[30] for it may often happen that a deed is delivered and accepted with intent to have it acknowledged at some future time;[31] and in one instance a court has gone so far as to say that a subsequent acknowledgment is of itself evidence of a prior delivery.[32]

§ 494. Presumption from recording. The vital principle of delivery is the reciprocal intention to give and to receive;

Meach v. Fowler, 14 Ark. 29; Deininger v. McConnell, 41 Ill. 228; Treadwell v. Reynolds, 47 Cal. 171; Harman v. Oberdorfer, 33 Gratt. (Va.) 497; Raines v. Walker, 77 Va. 92; Ellsworth v. R. R. Co. 34 N. J. L. 93; Wheeler v. Single, 62 Wis. 380; Robinson v. Gould, 26 Iowa 89.

[26] Whitman v. Henneberry, 73 Ill. 109.

[27] Treadwell v. Reynolds, 47 Cal. 171; Eaton v. Trowbridge, 38 Mich. 454.

[28] Fontaine v. Savings Institution, 57 Mo. 553; Brolasky v. Furey, 12 Phil. (Pa.) 428; Johnson v. Moore, 28 Mich. 3; Henry v. Bradshaw, 20 Iowa 255.

[29] People v. Snyder, 41 N. Y. 402; Hardin v. Osborne, 60 Ill. 93; Billings v. Stark, 15 Fla. 297.

[30] Raines v. Walker, 77 Va. 92; Clark v. Akers, 16 Kan. 166.

[31] Harmon v. Oberdorfer, 33 Gratt. (Va.) 502.

[32] Ford v. Gregory, 10 B. Mon. (Ky.) 180. The fact of delivery is usually mentioned in the attestation of witnesses, but is not, as a rule, alluded to in the certificate of the officer who takes the acknowledgment; yet as the parties acknowledge "execution," and as delivery may properly be held to be a part of the execution, and necessary to its validity, the reason of the last citation may be seen. As certificates are sometimes drawn the facts of execution are stated, as, that the grantor acknowledged that he "signed, sealed

hence, as has been shown, actual manual delivery is not essential to a valid legal act, and circumstances which tend to show this intention may be received as evidence of the fact. For this reason the registry of a deed by the grantor is entitled to great consideration, and may, under favorable circumstances, or in the absence of opposing evidence, justify the presumption of a delivery.[33] The presumption is not conclusive, however, and may be repelled by any inconsistent facts, as where the grantee had no knowledge of the existence of the deed, and the property which it purported to convey always remained in the possession and under the control of the grantor;[34] yet, ordinarily, the recording of the instrument not only affords *prima facie* evidence of delivery, but, when properly executed and acknowledged, raises a legal presumption of that fact;[35] and generally a delivery will be presumed, in the absence of direct evidence of the fact, from concurrent acts of the parties recognizing a transfer of title.[36]

The record of a deed not only indicates delivery, but, where to the grantee's advantage, an acceptance as well;[37] and where the grantor in a deed not actually delivered causes the same to be recorded, this will constitute a sufficient delivery to enable the grantee to hold the land as against the grantor.[38] But while the recording of a deed may afford at least *prima facie* evidence of delivery and acceptance, this must be under-

and delivered" the deed. In such event the certificate may fairly be said to evidence a prior delivery.

[33] Younge v. Guilbeau, 3 Wall. (U.S.) 636; Himes v. Keighblinger, 14 Ill. 469; Burkholder v. Cased, 47 Ind. 418; Kille v. Ege, 79 Pa. St. 15; Counard v. Colgan, 55 Iowa 538; Elsberry v. Boykin, 65 Ala. 336; Moore v. Giles, 40 Conn. 570; Rowell v. Hayden, 40 Mo. 582; Wellborn v. Weaver, 17 Ga. 267; Bullitt v. Taylor, 34 Miss. 708.

[34] Younge v. Guilbeau, 3 Wall. (U. S.) 636; Wiggins v. Lusk, 12 Ill. 132; Leppack v. Union Bank, 32 Md. 136; Knolls v. Barnhart, 71 N. Y. 474; Jefferson, etc. Assoc. v. Heil, 81 Ky. 513.

[35] Kille v. Ege, 79 Pa. St. 15; Alexander v. Alexander, 71 Ala. 295; but see Boyd v. Slayback, 63 Cal. 493.

[36] Thus, where a deed had been executed and recorded without the knowledge of the grantee, who subsequently executed a conveyance to a third party, this recognition by both parties of the transfer of the title would be sufficient evidence that at the time a delivery of the deed had been made. Gould v. Day, 4 Otto (U. S.) 405.

[37] Metcalfe v. Brandon, 60 Miss. 685; Masterson v. Cheek, 23 Ill. 73; Cecil v. Beaver, 28 Iowa 241.

[38] Kerr v. Birnie, 25 Ark. 225; Dale v. Lincoln, 62 Ill. 22; Kings-

stood as applying only to a deed simply conveying the premises, and not to one which imposes an obligation on the grantee or creates an assumption on his part in regard to pre-existing incumbrances.[39]

As before remarked, however, the recording of a deed raises no conclusive presumption;[40] and where a grantor has, without the knowledge of the grantee, caused a deed to be recorded, which afterwards has been returned to him and by him retained, the question as to whether, as a matter of law, there has been a delivery, is one which it seems has puzzled courts to decide.[41] The voluntary record of a deed, absolute in form and beneficial to the grantee, is ordinarily a good delivery; yet, as delivery is essentially a question of intent, and as a delivery without an intent to deliver is no delivery in law,[42] the embarrassment of the question is manifest.[43]

The presumption of delivery of a deed arising from its being recorded is rebutted by proof that the grantee never was in possession nor claimed under the deed; that the land was valuable only for its use and occupation; and that the grantor, his heirs and representatives have remained in undisturbed possession for more than the period covered by the statute of limitation, without recognizing any rights under the deed. Non-delivery by the grantor, or a reconveyance, is then presumed;[44] or it may be presumed, either that the

bury v. Burnside, 58 Ill. 310; Palmer v. Palmer, 62 Iowa 470.

[39] Thompson v. Dearborn, 107 Ill. 87.

[40] Jefferson, etc. Assoc. v. Heil, 81 Ky. 513.

[41] See Vaughn v. Goodman, 94 Ind. 191; Alexander v. Alexander, 71 Ala. 295.

[42] Jordan v. Davis, 108 Ill. 336.

[43] A., for the purpose of protecting himself against judgments, conveyed land through a third person to his wife. A. caused the deeds to be recorded and kept them himself until he died. *Held*, in a suit between A.'s wife and A.'s children, that a delivery of the deed to the wife did not sufficiently appear from these facts. McGraw v. McGraw, 79 Me. 257. So, also, in a case where the grantor, for the purpose of placing his land beyond the reach of his creditors, made a deed to his nephews, one of whom was an infant. There was no manual delivery, although the nephews, when informed of the transaction, assented thereto; the grantor, however, retained the custody and control of the deed. *Held*, that there was no delivery. Weber v. Christen, 121 Ill. 91.

[44] Knolls v. Barnhart, 71 N. Y. 474.

grantee never accepted the deed or had relinquished any claim thereunder.[45]

§ 495. **Presumption from possession of instrument.** Possession has ever been regarded as one of the strongest evidences of ownership. The principle is practically unlimited in its application, and carries with it as a corollary the further principle that such ownership had its origin in a claim of right. Acting upon this principle the possession and production of a properly-executed deed by the grantee therein named raises a presumption, in the absence of any controlling circumstances to the contrary, that the same was legally delivered;[46] and only clear and convincing evidence can overcome this presumption.[47] Still the question of delivery is a question of intent, and a delivery without the intent to deliver is not a delivery in law;[48] therefore, where it is found as a fact that a deed was never delivered, it is void although it came into the possession of the person named therein as grantee and was recorded.[49] Cases very frequently arise where the deed is handed to the grantee for inspection, or for some temporary purpose, where there is no completion of the transfer and no intention of giving the deed effect, and in such cases there is no valid delivery.[50]

§ 496. **Presumptions in case of voluntary deeds.** It would seem that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary conveyance than in ordinary cases of bargain and sale,[51] and the authorities go

[45] Trafford v. Austin, 3 Tenn. Ch. 492.

[46] Wallace v. Berdell, 97 N. Y. 13; Newlin v. Beard, 6 W. Va. 110; Brittain v. Work, 13 Neb. 347; Tunnison v. Chamberlin, 88 Ill. 379; Butrick v. Tilton, 141 Mass. 93; Simmons v. Simmons, 78 Ala. 365. (In Andrews v. Dyer, 78 Me. 427, which was a real action brought by the plaintiff Melissa A., who claimed title under a deed from her deceased husband running to Mercy A., it was *held* that the rule that the production of a deed by the grantee is *prima facie* evidence of its delivery was inapplicable, plaintiff not appearing to be the grantee.)

[47] McCann v. Atherton, 106 Ill. 31; Simmons v. Simmons, 78 Ala. 365. (The presumption may be overcome by proof of fraud, but such proof must be clear and explicit. Cover v. Manaway, 115 Pa. St. 338.)

[48] Jordan v. Davis, 108 Ill. 336; Cherry v. Herring, 83 Ala. 458.

[49] Dwinell v. Bliss, 58 Vt. 353.

[50] Gilbert v. Ins. Co., 23 Wend. (N. Y.) 43.

[51] Reed v. Douthit, 62 Ill. 348;

far to establish the proposition that an instrument may be good as a voluntary settlement even though it be retained by the grantor in his possession until his death.[52] The cases in this respect, however, are generally attended with the qualification that there shall be no circumstances besides the mere fact of retaining the instrument to show that the executing party did not intend it to operate immediately, or to denote an intention contrary to that appearing upon the face of the deed. But notwithstanding the deed purports to be an absolute conveyance of the grantor's entire interest *in presenti,* if it nevertheless appears that such deed was not intended to be absolute, but to be qualified in effect;[53] or if it appears that it was not intended to convey the grantor's whole interest, but to leave in him a life estate or some other interest; or that it was not intended to operate presently, but only upon the grantor's death,[54] or the doing of some particular act or happening of a certain contingency—then the presumption ceases, and the fact that the grantor has kept the deed in his own possession becomes indicative of non-delivery.[55]

§ 497. No presumption from execution. Simply executing

Walker v. Walker, 42 Ill. 311; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240.

[52] Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Scrugham v. Wood, 15 Wend. (N. Y.) 545; Otis v. Beckwith, 49 Ill. 121.

[53] Jones v. Loveless, 99 Ind. 317.

[54] Williams v. Schatz, 42 Ohio St. 47; Davis v. Cross, 14 Lea (Tenn.) 637.

[55] Cline v. Jones, 111 Ill. 563; Goodlett v. Kelly, 74 Ala. 213. In Byars v. Spencer, 101 Ill. 429, it appeared that one Thomas Whitson, a widower, who had been twice married, had two minor children by the second marriage. Before he died, he executed and acknowledged a deed conveying to them the farm on which he lived. It was never delivered to the grantees, nor to any one for them, nor ever recorded, and did not pass out of the grantor's control, but was placed by him in a bureau in his house with other papers, where it remained until his death. He expressed to the justice who took his acknowledgment his intention that the land should go to these children, saying that he had given his older children, who were grown and had left him, a good farm. In reply to the suggestion that it should be delivered and recorded, he replied that, being the natural guardian of the children, he was the proper person to have custody of the deed; but that he objected to recording it at that time, because if he could sell the land for $6,000 he wished to do so and divide the money between the children, and if it was on record it would not be possible to make a good title, since his children were minors. But some time before

and acknowledging a deed pursuant to previous agreement, while it may be evidence which, when taken in connection with other circumstances, may tend to disclose intent, will not of itself amount to a delivery,[56] and no legal presumption will arise from such acts.[57] A party claiming under a deed must always prove its delivery; and this is not accomplished by a simple showing of the fact of execution, nor even by such fact and the further circumstance that it has passed from the grantor's hands; for a delivery to a third person, or even to the grantee, may be made for other purposes than to give the deed effect, and the mere fact that it is put into their hands, if not as a completed transfer, will not bind the grantor.[58]

§ 498. **Sufficiency of proof of delivery.** To constitute the act of a grantor a delivery of a deed, it must be such as to manifest an intention on his part to make a delivery, and to part with the possession and control of the instrument. Yet, as previously remarked, this intention may be gathered from acts or words, or from both; and it is not essential that the deed be delivered to the grantee, or indeed that it ever actually pass from the hands of the grantor.[59] Any competent testimony which clearly and unmistakably tends to show the essential facts will, in the absence of any evidence

his death he offered to sell the farm, and on several occasions called it his. The court held there was no delivery. See also Stinson v. Anderson, 96 Ill. 373.

[56] Turner v. Carpenter, 83 Mo. 333.

[57] Boyd v. Slayback, 63 Cal. 493.

[58] Jackson v. Phipps, 12 Johns. (N. Y.) 418; Prutsman v. Baker, 30 Wis. 644; Bovee v. Hinde, 135 Ill. 137. The deposit of a properly-executed deed with a public officer, but not for record, and with no purpose of giving the deed effect, was held no delivery. Austin v. Register, 41 Mich. 723. Complainant made a deed of his land, including his homestead, to defendant, with intent to have the same delivered after his death, and gave it to one N. to hold subject to complainant's order. It was understood between complainant and the person who drew the deed that complainant could rescind or alter it at will. Complainant gave defendant an order on N. for the deed in order to show it to defendant, and to induce him to secure certain payments to complainant's other heirs—the deed, in such case, to be operative at complainant's death. Defendant took the deed and put it on record. *Held*, that there was no delivery of it, and complainant could rescind it and have it canceled of record. Pennington v. Pennington (Mich.) 42 N. W. Rep. 985.

[59] Munoz v. Wilson, 111 N. Y. 295.

contradicting or impeaching it, or of any circumstances which may throw suspicion upon it, be sufficient to establish a valid delivery,[60] and the court may instruct the jury to find a delivery where the whole testimony shows a state of facts from which delivery is a positive inference of law.[61] But the testimony should be of such a character as to leave no doubt as to the grantor's intention that the deed should at the time become operative and effectual. Upon this point all the questions relative to delivery turn, and the proof must satisfactorily establish this fact before the deed can be regarded as evidence of a conveyance.[62]

§ 499. **Delivery to infant.** Deeds to infants of tender years are governed by somewhat different rules than those which prevail in case of adults. Thus, if a parent executes a deed to an infant child and in his interest, and manifests by words and conduct an intention that the deed shall operate at once, a delivery will be presumed, and proof of an actual delivery will be unnecessary. The duty of the parent, in such a case, to accept and preserve the deed for the infant until he arrives at majority, is sufficient to warrant the presumption of delivery, and, when the grantor is also the father of the grantee, to

[60] Otis v. Spencer, 102 Ill. 622; Stinson v. Anderson, 96 Ill. 373; Cover v. Manaway, 115 Pa. St. 338; McLaughlin v. Manigle, 63 Tex. 553.

[61] Jones v. Swayze, 42 N. J. L. 279.

[62] See Gorman v. Gorman, 98 Ill. 361; Benneson v. Aiken, 102 Ill. 284. A grantor upon signing a deed put it before the grantee, saying, "There is no go back from that," and the witnesses then subscribed their names. A note, which was to be the consideration of the deed, was not handed to the grantor, but the two papers were taken up by the grantee, and the parties went to a magistrate, by whom the acknowledgment was taken and certified; but the grantor withheld the deed from the grantee, and the grantee did not then assent or claim that it had previously been delivered; and the grantor, in his answer to a bill in equity, denied that it had been delivered. *Held*, that a delivery had not been proved. Mills v. Gore, 20 Pick. (Mass.) 28. A father executed and acknowledged a deed purporting to grant an estate to his three adult sons, to take effect presently, and then delivered the deed to one of them, saying, "Take this deed and put it in our box at the bank." He did no other act showing an intention to formally deliver the instrument and himself retained possession of the land granted, receiving the rents and profits, during his lifetime; *held*, that the instrument was inoperative for want of a sufficient delivery. Hayes v. Boylan, 141 Ill. 400.

evince an unmistakable intent on his part to give the deed effect and pass title.[63]

§ 500. **Delivery to third person.** It is not necessary, to effect a valid delivery, that the instrument should pass from the hand of the grantor to the grantee,[64] for the law only requires some act that shall preclude a revocation, and hence such delivery may be made to a third party authorized to receive it,[65] or even to a stranger for the use of the grantee,[66] provided, of course, there is a subsequent ratification;[67] and generally a delivery to any third person, intended to give the deed effect and to make the conveyance operative, is a legal delivery,[68] and will operate to transfer title to the grantee therein named by relation as of the time it was received by such third person.[69]

But a delivery to a third person made for other purposes than to give the deed effect will be inoperative, and the mere fact that it is put into the hands of such third person, if not as a completed transfer, will not bind the grantor.[70] So, also, where a deed was intrusted to grantor's agent to be delivered after death, it was held there could be no continuance of agency after death, and that there was no valid delivery,[71]

[63] Bryan v. Wash, 7 Ill. 568; Masterson v. Cheek, 23 Ill. 72; Colee v. Colee, 122 Ind. 109; Newton v. Bealer, 41 Iowa 334. But compare Byars v. Spencer, 101 Ill. 429.

[64] Cooper v. Jackson, 4 Wis. 537; Weber v. Christen, 121 Ill. 91.

[65] Duer v. James, 42 Md. 492; Eckman v. Eckman, 55 Pa. St. 269; Hatch v. Bates, 54 Me. 136; Hinson v. Bailey, 73 Iowa 544; Fisher v. Hale, 41 N. Y. 416; Ashford v. Prewitt, 102 Ala. 264.

[66] Duer v. James, 42 Md. 492; Hosley v. Holmes, 27 Mich. 416; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240; McCormick v. McCormick, 71 Iowa 379; Munoz v. Wilson, 111 N. Y. 295.

[67] Brown v. Brown, 66 Me. 316; Fisher v. Hall, 41 N. Y. 423.

[68] Hosley v. Holmes, 27 Mich. 416; Owen v. Williams, 114 Ind. 179; Rosseau v. Bleau, 131 N. Y. 177; Parker v. Parker, 56 Iowa 111; Hatch v. Hatch, 9 Mass. 307; Peavy v. Tilton, 18 N. H. 151.

[69] Munoz v. Wilson, 111 N. Y. 295.

[70] Jackson v. Phipps, 12 Johns. (N. Y.) 418; Austin v. Register, 41 Mich. 723. A deed in a third person's hands subject to the grantor's orders was held not delivered. Prutsman v. Baker, 30 Wis. 644.

[71] Wellborn v. Weaver, 17 Ga. 267; McElroy v. Hiner, 133 Ill. 156; Anderson v. Anderson, 126 Ind. 62. But see Foster v. Mansfield, 3 Met. (Mass.) 412, where it was *held* that if a grantor, at the time of his giving directions for the making of a deed, and after the deed is drawn and presented to him, di-

notwithstanding the instrument had been actually transmitted pursuant to such instruction.[72] But such rule must be considered as having application only where the grantor assumes to still control the deed;[73] for the cases are numerous where deposits made with third persons for transmittal to the grantee after the grantor's death have been sustained as valid deliveries.[74]

§ 501. Delivery to take effect after death of grantor. Closely connected with the subject discussed in the preceding paragraph is the character to be given to instruments left with a third person to hold until the death of the grantor and then to be delivered to the grantee. Notwithstanding some of the earlier decisions to the contrary, the current of later authority seems to establish the doctrine that, where the grantor reserves no privilege of revoking or recalling the deed, its legal effect is that of an escrow, which, upon the happening of the contingency of death, relates back to the first delivery and becomes effective to convey the grantor's title.[75]

The reasonings by which these deliveries have been sup-

rects and intends that from and after its execution it shall be taken and retained by the scrivener until after the grantor's death, and then be delivered to the grantee, all of which is afterwards done, the estate vests in the grantee from the time of the execution of the deed. See, also, Shackelton v. Sebree, 86 Ill. 616.

[72] Weisinger v. Cock, 67 Miss. 511; Cook v. Brown, 34 N. H. 460; Brown v. Brown, 66 Me. 316; and see Wellborn v. Weaver, 17 Ga. 267, where such a delivery was denied effect even as an *escrow*, but, *en semble*, might be proved as a testamentary paper.

[73] It has been held that if a person executes a deed of land and places it in the hands of A., with directions to keep it during the grantor's life, and on his death to deliver it to the grantee, A. holds it as an agent of the grantor and not as agent of the grantee, and that the grantor may revoke it at any time. Hale v. Joslin, 134 Mass. 310.

[74] As where a woman went with her daughter to a justice of the peace and signed and acknowledged before him a conveyance of land to the daughter. The mother told the justice to keep the deed until she died, and then to record it. *Held*, that the deed should be deemed to have been delivered when signed and acknowledged. Hinson v. Bailey, 73 Iowa 544. See, also, Smiley v. Smiley, 114 Ind. 258; Foster v. Mansfield, 3 Met. (Mass.) 412; Shackelton v. Sebree, 86 Ill. 616.

[75] Hockett v. Jones, 70 Ind. 227; Stephens v. Huss, 54 Pa. St. 20; Howard v. Patrick, 38 Mich. 805; Wall v. Wall, 30 Miss. 91; Thatcher v. St. Andrew's Church, 37 Mich. 264; Owen v. Williams, 114 Ind.

ported have not always been the same; indeed, they are very diverse, but the conclusions arrived at all sustain the doctrine that, when a grantor places in the hands of a third party his written deed with instructions to hold until the grantor's death and then to deliver it to the grantee, if such deposit is made with no other condition or reservation, and if the grantor by such act absolutely parts with all control or dominion over it, with no right to recall it or alter its provisions, or to have or enjoy any other or further interest in the lands conveyed than to hold the use thereof until his death, a valid delivery is established when consummated by the final act of transference to the grantee. The essential requisite in such case seems to be, that when placed in the hands of the depositary the instrument shall at once pass beyond the control of the grantor for all time, and his intention in the matter is a question of fact to be ascertained by the light afforded by all the circumstances surrounding the transaction.[76] The general theory involved in the discussions of the foregoing conclusions seems, in the main, to be, that the grantor, in effect, by the absolute delivery to the depositary, converts his estate into a life tenancy, the remainder in fee vesting in the grantee.[77]

There is some confusion in the reported cases as to when the deed takes effect, but, while some hold that it becomes operative only upon the delivery by the depositary after the death of the grantor, such second delivery relating back to the first so as to divest title, the better and more logical rule, passes the title, full and complete, upon the first delivery. Indeed any other rule infringes upon the law relating to devises and produces an incongruity that is difficult to reconcile with the settled principles which govern the disposition of property by deed and will.

§ 502. **Continued—Testamentary deeds.** The question usually raised in matters of the kind discussed in the preceding paragraph is one of construction, the point to be decided being whether the instrument is to be considered as a deed or a will. It is well established that neither the form nor manner of execution of an instrument will affect its character, as

179; Hinson v. Bailey, 73 Iowa 544.

[76] Bury v. Young, 98 Cal. 446; Sneathen v. Sneathen, 104 Mo. 201; O'Kelly v. O'Kelly, 8 Met. (Mass.) 439; Prutsman v. Baker, 30 Wis. 650; Cook v. Brown, 34 N. H. 460.

[77] See Prutsman v. Baker, 30 Wis. 650.

this must be determined from its operation. If it takes effect *in presenti* it is a deed; if, on the other hand, it does not become operative until the death of him who makes it, it is a will, whatever be its form. Thus a deed, if made with a view to the disposition of a man's estate after his death, will inure in law as a devise or will.[78] A deed must take effect upon its execution or not at all.[79] Again, a deed, when once passed, cannot be revoked; a will remains ambulatory to the day of the testator's death. Applying these principles, the character of instruments under consideration can soon be determined. If the delivery to the depositary be absolute, the grantor surrendering all power or control over the instrument, effect should be given to it as a deed of conveyance.[80] But a party cannot make a deed for land and retain its custody, and have it operate as a conveyance only at or after his death;[81] nor can he effect such a result by simply depositing the deed with a third person if he continues to have the right to recall it;[82] and in such event, even though he dies without recalling it, a delivery by the depositary to the grantee would be without effect.[83]

The lodgment of a deed, properly executed and acknowledged by the grantor, in a place to which the grantee has

[78] Wellborn v. Weaver, 17 Ga. 267.

[79] Cline v. Jones, 111 Ill. 563.

[80] Prutsman v. Baker, 30 Wis. 644; Brown v. Brown, 66 Me. 316; Ball v. Foreman, 37 Ohio St. 139; Baker v. Haskell, 47 N. H. 479; Hinson v. Bailey, 73 Iowa 544.

[81] Cline v. Jones, 111 Ill. 563; Goodlett v. Kelly, 74 Ala. 213; Miller v. Lullman, 81 Mo. 311; Ball v. Foreman, 37 Ohio St. 139.

[82] This is so even though the grantor may not have intended to retain such right and does not exercise it. Williams v. Schatz, 42 Ohio St. 47. A., while sick, executed a deed of gift to his son B., and gave it to C., saying, "Take this deed and keep it. If I get well I will call for it. If I don't, give it to B." A. died of that sickness within a few days, and C. then handed the deed to B. *Held*, that there was no delivery. Williams v. Schatz, 42 Ohio St. 48.

[83] The grantor in a deed, fearing the approach of death, called her attendant to bring out a certain box and told her to take it into her lap; that she put it into her possession; that it contained her will, deeds to two houses and a thousand dollars in gold; that on the deeds were the names of the persons who were to have the houses; that the box should be delivered to her executor; that if she lived she would talk further about the contents of the box, but in any event not to open it until after the funeral. It further appeared that her attendant accordingly took charge of the box, and she soon after died.

access, and from which he can without hindrance transfer it to his own possession, with intent on the part of the grantor that the grantee may after his death take it and have it recorded, does not constitute a delivery.[84] Upon this point, however, the authorities are somewhat discordant—not as to the law, but in the application of the law to particular facts; and numerous decisions appear to militate in some measure against the proposition last stated.[85]

§ 503. **Deed retained by grantor.** The fact that the grantor retains the custody of the deed does not in any way affect the operation of a former delivery; and there are numerous cases where deeds found to have been in the custody of the grantor at his death have been held valid on proof, or facts amounting to proof, that he had made an effectual delivery, and become a mere custodian of the deed thereafter.[86] Nor is it necessary that the grantee or his agent should be present at the execution of a deed, or himself actually manually receive the instrument, to render it operative; but it should be placed within the power of some other person for the grantee's use, or the grantor should clearly indicate it to be his intention that the instrument should take effect as a conveyance of the property, so that if he retain the possession of the deed it should appear to be merely as bailee of the grantee; and in every instance where a deed is retained in the grantor's custody there must be unequivocal proof of a legal delivery intended to be operative.[87]

Held, that there was no sufficient delivery of the deed to pass a title. Porter v. Woodhouse, 59 Conn. 568.

[84] Scott v. Scott, 95 Mo. 300.

[85] As where a father duly executed a deed to his son with intent that his son should assume control of his property after his death, but fearing that his son's wife might dispossess him if she knew of the conveyance he placed the deed in his son's trunk, where it was found after the grantor's death. *Held*, that there was a delivery. Hill v. Hill, 119 Ill. 242.

[86] Reed v. Douthit, 62 Ill. 348; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240.

[87] Fisher v. Hall, 41 N. Y. 416. Thus, where a conveyance of real estate has been subscribed and sealed by the grantor, attested by witnesses under a clause stating that it had been sealed and delivered in their presence, but the grantee was not then present, and remained ignorant of the existence of the deed until long after the death of the grantor, and the grantor continually remained in the possession of the premises until his death, when the deed was

A deed duly executed, but retained by the grantor until the land should be paid for, and he dying before payment, was held inoperative;[88] and in like manner a deed made by the grantor, and retained by him with the distinct understanding that it would become operative at his death, and found among his papers with a will which it was designed to alter, was held void for want of delivery during life.[89]

Where the grantor has by will or otherwise asserted that an actual delivery has taken place, such deeds have been maintained, as they have also been in some cases where there was a previously-recognized obligation to make them and they purport to have been made in execution of it; but the retention of control of title has always been held inconsistent with the validity of a deed held in custody. It would seem, therefore, that any deed which is to be maintained after death must have been made operative by some valid delivery by the grantor during life; and while a disposition has been shown in some cases to raise presumptions on equitable showings, there is no foundation for any rule that will sustain an undelivered deed, and there is no room for presumption when the facts appear.[90]

§ 504. When grantor will be estopped. The intention of the parties is in all cases the controlling element in determining the operation and effect of a delivery. If the grantor intended a present delivery, and the grantee so understood and intended that there should be an acceptance, a formal delivery to the grantee in person would not be necessary to determine the character of the transaction or fix the rights of the parties so far as they may be dependent on that fact. Thus, where the grantor induces the grantee to believe that a deed has been executed which makes him the owner of certain premises, and permits the grantee to act under this belief in

found among his papers, *held*, that such conveyance was wholly inoperative to pass the title, and no delivery thereof to the grantee could be presumed or inferred from these facts. Ibid.

[88] Jackson v. Dunlap, 1 Johns. Cas. (N. Y.) 114.

[89] Stillwell v. Hubbard, 20 Wend. (N. Y.) 44; and see Fain v. Smith, 14 Ore. 82. A father, a year before his death, executed and acknowledged a deed to his son. He did not deliver it, but directed his daughter to do so after his death, upon the execution of a note by the son. *Held*, that the deed was inoperative. Taft v. Taft, 59 Mich. 185.

[90] Taft v. Taft, 59 Mich. 185; Fain v. Smith, 14 Ore. 82.

making valuable improvements on the land, he will be estopped from alleging that the deed is inoperative for want of formal delivery.[91]

§ 505. **Revocation and redelivery.** Properly speaking there can be no revocation of a deed which, being duly executed, has been actually or constructively delivered. By that act the title has passed beyond the grantor's control; and though he may still avail himself of the remedies which the law affords either for reformation, cancellation or rescission, the power of revocation no longer exists. The fact that after delivery the deed has been returned to the grantor and by him retained neither negatives nor disproves its previous delivery; nor will it destroy or in any way affect the title of the grantee as between the parties;[92] nor will the further fact that it has been canceled or destroyed while thus in the grantor's possession serve to divest title on the one hand or re-invest it on the other,[93] notwithstanding such may have been the intention of the parties;[94] nor will the voluntary destruction of same by the grantee be effective to reconvey title.[95] The mere act of destroying the evidence of title can have no effect upon the title itself; and this being vested in the grantee, he will

[91] Walker v. Walker, 42 Ill. 311.

[92] Thomas v. Groesbeck, 40 Tex. 530; Hart v. Rust, 46 Tex. 556; Wallace v. Berdell, 97 N. Y. 13; Burkholder v. Cased, 47 Ind. 418; Albert v. Burbank, 25 N. J. Eq. 404; Kimball v. Grey, 47 Ala. 230.

[93] Warren v. Tobey, 32 Mich. 45; Reavis v. Reavis, 50 Ala. 60; Rogers v. Rogers, 53 Wis. 36; Jackson v. Gould, 7 Wend. (N. Y.) 364; Botsford v. Morehouse, 4 Conn. 550; Marshall v. Fisk, 6 Mass. 24; Tibeau v. Tibeau, 19 Mo. 78; Kearsing v. Kilian, 18 Cal. 491; Patterson v. Yeaton, 47 Me. 308; Jordan v. Jordan, 14 Ga. 145; Watters v. Wagely, 53 Ark. 509.

[94] Warren v. Tobey, 32 Mich. 45; Reavis v. Reavis, 50 Ala. 60; Chessman v. Whittemore, 23 Pick. (Mass.) 231; but see Sawyer v. Peters, 50 N. H. 143; Howard v. Huffman, 3 Head (Tenn.) 564. A deed is but the evidence of a conveyance; and the destruction of a deed, while it affects the evidence of a conveyance, does not vacate or affect the conveyance itself or reinvest title in the grantor. Erwin v. Hall, 18 Ill. App. 315. Where a deed has been made to a married woman, and, before recording it, she sells the land to a third person, and surrenders her deed to her grantors, and has them execute a deed to such person, he gets no interest in the land, as title cannot be divested by cancellation and surrender of a deed. Watters v. Wagely, 53 Ark. 509.

[95] Potter v. Adams, 125 Mo. 118; Van Hook v. Simmons, 25 Tex. 323.

continue to hold it as against the grantor.[96] The grantee, however, although possessing the estate, having voluntarily and without fraud or mistake destroyed the evidences of his legal ownership, would, in case of an unrecorded deed, be left entirely without means by which he could afterwards establish or prove his title;[97] and in such case the title, in a very restricted sense, may be said to have reverted, because the grantee is estopped to assert or prove it,[98] and thus the intention of the parties may become effective. Again, while the redelivery or destruction of the deed can have no effect as a transfer of the legal title, it may under some circumstances vest an equitable title,[99] or at least preclude the grantee from asserting the same; and as in equity such a title may be set up against a legal title, courts in a proper case will not interfere to divest them.[1]

But while the foregoing represents the doctrine enunciated and sustained by the volume of authority upon the subject, it would yet seem that a different rule is maintained in some states, where it is held that a voluntary surrender or cancellation, with intent to revest title in the grantor, may operate as a reconveyance when the cancelled deed has not been

[96] Parker v. Kane, 4 Wis. 1; Hentch v. Hentch, 9 Mass. 307; Jackson v. Page, 4 Wend. (N. Y.) 417; Jeffers v. Philo, 35 Ohio St. 173.

[97] Parker v. Kane, 4 Wis. 1; Dukes v. Spangler, 35 Ohio St. 119.

[98] Howard v. Huffman, 3 Head (Tenn.) 562; Speer v. Speer, 7 Ind. 178; Dukes v. Spangler, 35 Ohio St. 119; Farrar v. Farrar, 4 N. H. 191; Trull v. Skinner, 17 Pick. Mass. 213; Sutton v. Jervis, 31 Ind. 265.

[99] Commonwealth v. Dudley, 10 Mass. 402; Patterson v. Yeaton, 47 Me. 308; Lawrence v. Stratton, 6 Cush. (Mass.) 165. In the foregoing cases, however, where the grantee had surrendered his deed to the grantor, the property was then sold to a third person without notice.

[1] As where a husband, after having received a deed for a lot from his wife's parents, surrendered the deed to them for the purpose of having them convey the lot to his wife, and his deed was destroyed, it having never been recorded, and a new one made to his wife, in which he acquiesced for seventeen years before suing for a deed, *held*, that the surrender of his deed by the husband and the making of a new one to his wife did not divest his legal title, but passed an equitable title to his wife which a court of equity would protect. Sanford v. Finkle, 112 Ill. 146; but in this case the surrender by the husband and re-issue to the wife was regarded as in the nature of an equitable gift amounting to a settlement.

recorded,[2] and the rights of third persons have not intervened.[3] So, too, under the operation of the rule last stated, it has been held that where the grantee in possession under a deed duly executed, but not recorded, sells the land to a third person, cancels his deed, and requests his grantor to make a new conveyance to such third person, which he does, the title by such new conveyance is valid.[4]

But this doctrine, which is confined to a very few jurisdictions,[5] is fundamentally opposed to modern theories of the operation of the statute of frauds, which requires a conveyance to be evidenced by a writing, and even where it is permitted to obtain it is explained and supported not upon the principle of grant but of estoppel.[6]

§ 506. **Delivery in escrow.** Where a deed is delivered to a stranger, to be by him delivered to the grantee upon the performance of certain conditions, it is said to be in escrow. But as the first or preliminary delivery is simply a device for the greater convenience of the grantor, it has no operation in law, and the escrow takes effect as a deed only from the date of the second delivery; that is, from the date of its delivery to the grantee or some person in his behalf.[7] Prior to this event the estate, with all its incidents, remains in the grantor,[8] and in case of his death during the intervening period descends to his heirs,[9] subject, of course, to the equitable rights of the purchaser.[10] But while delivery is essential to render the deed effectual at law, it is in fact the performance of the

[2] See Farrer v. Farrer, 4 N. H. 191; Mallory v. Stodder, 6 Ala. 801; Sherburne v. Fuller, 5 Mass. 133.

[3] Trull v. Skinner, 17 Pick. (Mass.) 213; Hall v. McDuff, 24 Me. 311.

[4] Commonwealth v. Dudley, 10 Mass. 403; Holbrook v. Tirrell, 9 Pick. (Mass.) 105; but see Watters v. Wagely, 53 Ark. 509.

[5] It obtains mainly in the New England States.

[6] See Trull v. Skinner, 17 Pick. (Mass.) 215.

[7] Dyson v. Bradshaw, 23 Cal. 528; Smith v. Bank, 32 Vt. 341; Peter v. Wright, 6 Ind. 183; Resor v. R'y Co. 17 Ohio St. 139; Everts v. Agnes, 4 Wis. 343; Cogger v. Lansing, 43 N. Y. 550.

[8] Jackson v. Rowland, 6 Wend. (N. Y.) 666; Cogger v. Lansing, 43 N. Y. 550.

[9] Teneick v. Flagg, 29 N. J. L. 25; Cogger v. Lansing, 43 N. Y. 550.

[10] But only in the event that the contract can be shown by a valid agreement—i. e., an agreement sufficient to take the transaction out of the operation of the statute of frauds. Cogger v. Lansing, 43 N. Y. 550.

conditions that imparts life and validity;[11] and for this reason equity regards the title as vesting in the grantee whenever this has been done.

It will be seen, therefore, that, unlike the ordinary case of delivery by grantor to grantee, no title passes until the conditions have been performed and the deed delivered to the purchaser, the second delivery deriving all its force from the first, of which it is the full consummation and execution. The essential requisite, however, is the performance of the conditions; and if, without such performance, the depositary delivers the escrow to the grantee except by direction of the grantor, the deed will, as between the parties, be inoperative and void. The fact that the grantee takes it in good faith does not alter the rule; for it is fundamental that the delivery must be with the assent of the grantor, and this is never presumed while the conditions remain unperformed.[12] With respect to third parties the decisions are not in complete harmony. Undoubtedly a purchaser from a grantee in escrow who had knowledge of the facts attending the deposit and delivery would take no better title than his grantor, and the estate in his hands would be subject to any infirmity originally attaching to it. Hence, if the delivery by the depositary had been against the assent of the grantor in escrow, or if it had been procured by fraud, or before the proper conditions had been performed, and the second purchaser had knowledge of these facts, he would acquire no title by the sale.[13] But with respect to an innocent purchaser who, in good faith and for value, acquires title from a fraudulent grantee, a different rule should, and it seems does, prevail.

There are cases which strenuously hold that in every instance where by improper means the grantee in escrow has obtained possession of the deed, and subsequently conveys to third parties, the superior equity is with the original grantor, who is considered as never having parted with the title, and the good or bad faith of the purchaser is immaterial;[14] but

[11] Hinman v. Booth, 21 Wend. (N. Y.) 267; Groves v. Tucker, 18 Miss. 9; Laubat v. Kipp, 9 Fla. 60; State Bank v. Evans, 15 N. J. L. 155; Smith v. Bank, 32 Vt. 341.

[12] Everts v. Agnes, 4 Wis. 343; Daggett v. Daggett, 143 Mass. 516; White v. Core, 20 W. Va. 272; Dixon v. Savings Bank, 102 Ga. 461.

[13] Everts v. Agnes, 6 Wis. 453 (second hearing).

[14] Tisher v. Beckwith, 30 Wis. 57; Everts v. Agnes, 6 Wis. 453;

the later and better rule would seem to be that the general principles which underlie the law of notice are to be given full effect in this as in other cases, and that good faith, want of knowledge and parting with value, will confer upon the purchaser the same rights and afford to him the same protection that he would receive in any other species of fraudulent conveyance.[15]

An unauthorized or fraudulent delivery by the depositary may, however, be subsequently ratified by the grantor, in which event the legal effect of the transaction is not distinguishable from a delivery made in a proper manner. To accomplish this result an express ratification is not necessary for same may be presumed from the grantor's actions, his silence when called upon to speak, or other acts which go to create an estoppel *in pais*. In this way a subsequent purchaser may obtain protection although the delivery in escrow was void.[16]

It would seem to be a further rule that there can be no escrow until there is an actual contract of sale on the one hand and a purchase on the other. That is, a deed cannot be regarded as in escrow if the negotiations have not been closed or if anything remains to be settled to the satisfaction of the contracting parties. In such case the person holding the deed is a mere custodian, subject to the future orders of the grantor, and without right to deliver the instrument until notified by the grantor so to do.[17]

If a deed is deposited in escrow and the grantee dies the subsequent performance of the condition vests title in his

Dixon v. Savings Bank, 102 Ga. 461; and see Jackson v. Lynn, 94 Iowa 151.

[15] Quick v. Milligan, 108 Ind. 419; Blight v. Schenck, 10 Pa. St. 285. A grantor delivered a deed in escrow. The grantee procured it to show a bank, and, instead of returning it, placed it on record without the grantor's knowledge or consent, and without having performed the conditions of the escrow. On the faith of the record the bank took a mortgage from the grantee. *Held*, that the grantor could not question the bank's title. Simson v. Bank, 46 Hun (N. Y.) 156.

[16] See Cotten v. Gregory, 10 Neb. 125; Dixon v. Savings Bank, 102 Ga. 461.

[17] As where a deed was given to a third person to be delivered when "everything is all right and perfect" and there was nothing to indicate that the matter was to be settled otherwise than by the future agreement of the parties; *held*, there was no escrow. Miller v. Sears, 91 Cal. 282.

heirs,[18] and in like manner in case of the death of the grantor, if the condition is complied with the deed may be turned over to the grantee by the depositary and such delivery will relate back and take effect as of the original delivery.[19]

The vital principle of an escrow is the preliminary delivery to a stranger, and a delivery in escrow or upon conditions cannot be made to the grantee himself.[20] Such a delivery is absolute; and though it be contrary to intent the deed takes effect presently as the deed of the grantor, discharged of the conditions upon which it was made, which, so far as the vesting of title is concerned, are thereby rendered nugatory.[21] These are the general and well-recognized principles governing this branch of the law, yet they are not to be taken without qualification; for if the conditions are written in or upon the deed,[22] or if the deed be simply delivered to the grantee to await his determination to accept or not,[23] or is handed to the grantee for inspection, or is received or obtained by the grantee in any manner inconsistent with the general rules of law defining and fixing the method of the delivery of deeds, then the foregoing rule would not apply. If, however, a delivery was intended, then irrespective of any other intentions the deed becomes absolute.[24]

But the rule that a deed cannot be delivered to a party to whom it is made as an escrow, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete

[18] Lindley v. Graff, 37 Minn. 338.

[19] Lindley v. Graff, 37 Minn. 338; Dettmer v. Behrens, 106 Iowa 585; Stone v. Duvall, 77 Ill. 480.

[20] Carter v. Moulton, 5 Kan. 9; State v. Potter, 63 Mo. 212; Weber v. Christen, 121 Ill. 91; McAllister v. Mitchner, 68 Miss. 672.

[21] Worrall v. Munn, 5 N. Y. 229; Berry v. Anderson, 22 Ind. 39; Beers v. Beers, 22 Mich. 44; Fairbanks v. Metcalf, 8 Mass. 238; Stevenson v. Crapnell, 114 Ill. 19; McCann v. Atherton, 106 Ill. 31; Duncan v. Pope, 47 Ga. 445.

[22] Berry v. Anderson, 22 Ind. 39; Wendlinger v. Smith, 75 Va. 300.

[23] Brackett v. Barney, 28 N. Y. 341.

[24] As where the grantor placed a deed in the hands of the grantee upon the condition that it was to take effect only in case the grantor remained in Texas, and that if he returned it was to be delivered back and be of no force, *held* to be a delivery *in escrow*, but being to the grantee and not to a stranger the deed became absolute to the grantee. Stevenson v. Crapnell, 114 Ill. 19. Where the grantor voluntarily delivers a deed to the

contracts, requiring nothing but delivery to make them perfect according to the intention of the parties.[25]

The depositary of an escrow is limited strictly to the conditions of the deposit, a compliance with which alone justifies its delivery. He is a special, not a general agent, and the person dealing with him is bound to know the extent of his powers.[26]

§ 507. **Acceptance.** To constitute the delivery of a deed sufficient to pass title to real property it must not only be delivered by the grantor, but must also be accepted by the grantee.[27] It is the concurrence of the two acts that constitutes the delivery; and either, standing alone, will be insufficient to divest title. An express dissent on the part of the grantee renders the instrument ineffectual and void, and proof of dissent is always admissible.[28] An express assent is not required, however, to make up a valid delivery; for acceptance may be and very frequently is implied, and where the grant is beneficial to the grantee his consent will ordinarily be presumed in the absence of proof to the contrary.[29] Neither the presence of the grantee at the moment of delivery, nor his previous authority to a third person to receive the deed on his behalf, nor yet his subsequent express assent to it, are necessary to make a valid delivery; for in either case assent to a beneficial grant will be presumed, although of course dissent may be shown and the deed thereby rendered ineffectual.[30] Thus, the assent of an infant, or an imbecile, or a person otherwise incapacitated, will always be presumed

grantee he cannot show by parol that it was a conditional delivery. Williams v. Higgins, 69 Ala. 517.

[25] Wendlinger v. Smith, 75 Va. 309.

[26] Chicago, etc. Land Co. v. Peck, 112 Ill. 408; Evarts v. Agnes, 4 Wis. 343; Smith v. Bank, 32 Vt. 350; Ogden v. Ogden, 4 Ohio St. 182.

[27] Commonwealth v. Jackson, 10 Bush (Ky.) 424; Comer v. Baldwin, 16 Minn. 172; Welch v. Sacket, 12 Wis. 243; Bank v. Webster, 44 N. H. 264; Oxnard v. Blake, 45 Me. 602; Stewart v. Redditt, 3 Md. 67; Jackson v. Phipps, 12 Johns. (N. Y.) 418.

[28] Merrills v. Swift, 18 Conn. 257.

[29] Rogers v. Cary, 47 Mo. 235; Dale v. Lincoln, 62 Ill. 22; Cecil v. Beaver, 28 Iowa 241; Mitchell v. Ryan, 3 Ohio St. 377; Dikes v. Miller, 24 Tex. 317; Spencer v. Carr, 45 N. Y. 406; Jackson v. Bodle, 20 Johns. (N. Y.) 184; Bowden v. Parish, 86 Va. 67; Boody v. Davis, 20 N. H. 140.

[30] Merrills v. Swift, 18 Conn. 257; Thorne v. San Francisco, 4 Cal. 169; Weber v. Christen, 121 Ill. 91.

from the beneficial nature of the transaction and the question of knowledge becomes immaterial.[31]

A father conveyed to his daughter, six years old, certain realty in fee-simple without her knowledge and with no money consideration, and two days thereafter placed the deed on record. *Held*, that delivery and acceptance would be presumed. Vaughn v. Godman, 103 Ind. 499.

[31] Sneathen v. Sneathen, 104 Mo. 201; Colee v. Colee, 122 Ind. 109; Hayes v. Boylan, 141 Ill. 400.

CHAPTER XX.

ACKNOWLEDGMENT.

§ 508. General principles.
509. Who may take.
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519. Authentication by officer.
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§ 508. General principles. The primary office of an acknowledgment is to authenticate the conveyance concerning which it is made, and to furnish authority for the production of the instrument in evidence without other or further proof of its execution.[1] The certificate of authentication is no part of the deed, neither is it the act of either party to it;[2] and although a deed is defectively acknowledged or certified, or even not acknowledged at all, if made by persons who are *sui juris,* it is still valid and effectual as between the parties and subsequent purchasers with actual notice, and passes title equally with one duly acknowledged and certified.[3] The certificate cannot affect the force of the instrument,[4] but is only evidence in regard to its execution, affording *prima facie* proof of facts, which in its absence, may be established by other evidence. It is, however, a prerequisite for registration in a majority of the states, and a necessary incident to every deed designed to furnish constructive notice under the recording acts; and where by reason of defects or omissions the statutory requirements are not substantially complied with, the instrument is not legally recordable, and although actually transcribed the record thereof will not afford constructive notice.[5]

[1] Warvelle on Abstracts, 171-185, and cases cited.

[2] Harrington v. Fish, 10 Mich. 415; Gray v. Ulrich, 8 Kan. 112.

[3] Stevens v. Hampton, 46 Mo. 404; Hoy v. Allen, 27 Iowa 208.

[4] Dale v. Thurlow, 12 Met. 157.

[5] Pringle v. Dunn, 37 Wis. 449;

The formality of acknowledgment has been rendered extremely simple of late years, and a substantial compliance with the statute prescribing its form and requisites is all that is required in an ordinary certificate.[6] Material omissions, unaided by other circumstances, have frequently been held to vitiate the acknowledgment;[7] yet generally, when the defect can be reconciled, or does not defeat the acknowledgment by indefiniteness or uncertainty, it will not invalidate.[8] Courts are always inclined to construe clerical errors liberally;[9] and it is the policy of the law to uphold certificates whenever substance is found, and not to suffer conveyances, or proof of them, to be defeated by technical or unsubstantial objections,[10] and in construing them resort may always be had to the deed or instrument to which they are appended.[11] Nothing, however, will ordinarily be presumed in favor of a certificate, which should state all the facts necessary to a valid official act.[12]

§ 509. Who may take. The right to take and certify acknowledgment of deeds is wholly statutory, and can be exercised only by such officers as are directly named or by necessary implication designated or pointed out. This jurisdiction is usually divided into three classes: first, where the

Bass v. Estill, 50 Miss. 300; Willard v. Cramer, 36 Iowa 22.

[6] Russ v. Wingate, 30 Wis. 440; Bradford v. Dawson, 2 Ala. 203; Calumet Co. v. Russell, 68 Ill. 426; Carpenter v. Dexter, 8 Wall. (U. S.) 513; Ogden v. Waters, 12 Kan. 282; Jacoway v. Gault, 20 Ark. 190; Warren v. Hardy, 6 Md. 525; Alexander v. Merry, 9 Mo. 510; Barton v. Morris, 15 Ohio 408; Henderson v. Grewell, 8 Cal. 581; Dorn v. Best, 15 Tex. 62.

[7] Hiss v. McCabe, 45 Md. 77; Smith v. Hunt, 13 Ohio 260; Hayden v. Westcott, 11 Conn. 129.

[8] Hartshorn v. Dawson, 79 Ill. 108; Scharfenburg v. Bishop, 35 Iowa 60; Sanford v. Bulkley, 30 Conn. 344; Magness v. Arnold, 31 Ark. 103; Chandler v. Spear, 22 Vt. 388; Dail v. Moore, 51 Mo. 589; Tenney v. East Warren Co. 43 N. H. 343.

[9] Scharfenburg v. Bishop, 35 Iowa 60; Russ v. Wingate, 30 Miss. 440.

[10] Wells v. Atkinson, 24 Minn. 161; Kelly v. Calhoun, 95 U. S. 710.

[11] Wells v. Atkinson, 24 Minn. 161; Tubbs v. Gatewood, 26 Ark. 128; Barnet v. Praskauer, 62 Ala. 486.

[12] Witmore v. Laird, 5 Biss. (C. Ct.) 160; Jacoway v. Gault, 20 Ark. 190; Knight v. Smith, 1 Ore. 276. The taking of an acknowledgment is now generally regarded as a ministerial act (Odiorne v. Mason, 9 N. H. 24; Biscoe v. Bird, 15 Ark. 655; Lynch v. Livingstone, 6 N. Y. 422), and dependent on statute, and the certificate must show that the

proof is made within the state; second, where the proof is made without the state, but within the United States or the territories; and third, where the proof is made in a foreign country. Officers of the first and second classes are usually notaries public, the officers of courts having a seal, and justices of the peace. In the second class is also an officer known as a commissioner of deeds. Officers of the third class include ministers or secretaries of legations, consuls of the United States, and generally any officer authorized by the laws of such foreign countries to take acknowledgments of conveyances.

It would scarcely seem necessary to state that a grantee, notwithstanding he may be otherwise qualified, is not competent to take the acknowledgment of his grantor,[13] even though he is merely a trustee;[14] and generally, any interest whatever in the proceeding, no matter how slight or remote, will disqualify an officer in those states where acknowledgment is regarded as an act judicial in its nature; but this restriction does not extend to the attesting witnesses, who may properly act in both capacities.[15] Nor can a grantor

statutory requirements have been substantially pursued. Meddock v. Williams, 12 Ohio 377.

[13] Beaman v. Whitney, 22 Me. 413; Groesbeck v. Seeley, 13 Mich. 329. The impropriety of such, on general principles, is manifest; but it is further held, in some states, that the taking of an acknowledgment is a *quasi* judicial act, the officer acting in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance, actually is the grantor; and in determining further whether the person thus adjudged to be the grantor does actually and truly acknowledge that he executed the instrument. By his certificate he makes an official record of his adjudication; and inasmuch as no man can be a judge in his own case, it follows that the grantee in a deed can never act as an officer in taking an acknowledgment to the conveyance. Wasson v. Conner, 54 Miss. 351; Davis v. Beazley, 75 Va. 491. But where a sheriff's deed was acknowledged in a court over which one of the grantees presided as judge, *held*, no objection to the deed. Lewis v. Curry, 74 Mo. 49; and it would seem that in Kentucky, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take and certify the acknowledgment of a deed in which he is named as grantee. Stevenson v. Brasher, 13 S. W. Rep. 242.

[14] Dail v. Morse, 51 Mo. 589; Brown v. Moore, 38 Tex. 645; Bowden v. Parrish, 86 Va. 67.

[15] Baird v. Evans, 58 Ga. 350.

take his own acknowledgment.[16] It would seem, however, that the acknowledgment of a deed to a married woman is not invalid because taken before the husband of the grantee, who was a properly qualified officer.[17]

A question of a similar nature arises where the conveyance is made to a corporation and the acknowledgment of the deed is taken by a stockholder of such corporation. As to whether an officer so interested is a competent person to take an acknowledgment and as to the validity of a deed so certified with respect to the homestead rights of the grantors, the authorities are not in accord. It has been held, and it would seem with the better reason, that while acknowledgments taken before officers who are related to either party or interested in the instruments are contrary to public policy, and by no means to be encouraged, yet such acknowledgments are not absolutely void because of such interest or relationship, without more. Where there is no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, the mere fact that the acknowledgment was taken before such officer will not vitiate the instrument, nor render it void, if it is otherwise free from objection or criticism.[18] Much of the uncertainty which attends the solution of this question arises from the different estimates which are placed upon the act of acknowledgment, and as to whether it is to be regarded as judicial or ministerial in its nature.[19]

Clerks of courts having a seal have general jurisdiction in all of the states and territories,[20] and a deputy is usually

[16] Davis v. Beazley, 75 Va. 491.

[17] Kimball v. Johnson, 14 Wis. 674.

[18] Cooper v. Building Association, 37 S. W. Rep. 12.

[19] It has been held to be a ministerial act in the United States courts and in the courts of Arkansas, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, Maryland and Ohio, and in these states it is held that an officer may take acknowledgment though related or interested or a party. But it is held to be a judicial act in other states, to-wit, Alabama, California, Iowa, Missouri, North Carolina, Pennsylvania, Virginia, West Virginia, Mississippi. In Tennessee the courts have held that the act is judicial or *quasi* judicial, and especially so when it involves the privy examination of a married woman. Shields v. Netherland, 5 Lea (Tenn.) 197.

[20] May be taken by the judge of a court of record who is clerk of his own court, and the attestation certified by him under the seal of

permitted to take acknowledgments whenever the principal might if present.[21] But just how the attestation should be made, where the act is performed by a deputy, seems to be a matter of dispute. In some states it would appear that the act must purport to be the act of the principal and be signed with his name per deputy;[22] in others that the certificate must appear to be the act of the principal without reference to the deputy;[23] and again in others that the deputy may assume to exercise all the powers of his principal without mentioning or alluding to him in the body of the certificate or signature, the deputy in both cases signing his own name and title of office.[24]

Mayors of cities are also frequently given this power, but it would seem that the mayor of a town would have no right to exercise the right under the authority given to mayors of cities.

§ 510. **Form.** It has been repeatedly held by courts that in the acknowledgment of deeds it is sufficient if it appears that the statute has been substantially observed and followed.[25] A mere literal compliance is not demanded or expected.[26] The policy of the law is to uphold conveyances,[27] and in the

the court. Moore v. Hill, 59 Ga. 760.

[21] Touchard v. Crow, 20 Cal. 150; Hope v. Sawyer, 15 Kan. 252; Talbott v. Hooser, 12 Bush (Ky.) 408; Gibbons v. Gentry, 20 Mo. 468; Rose v. Newman, 26 Tex. 131; Kemp v. Porter, 7 Ala. 137.

[22] Abrams v. Erwin, 9 Iowa 87; Gibbons v. Gentry, 20 Mo. 468.

[23] Talbott v. Hooser, 12 Bush (Ky.) 408. And where one deputy clerk takes an acknowledgment of a deed, indorsing on it a memorandum thereof, another deputy may write out and sign the certificate. Drye v. Cook, 14 Bush (Ky.) 459.

[24] McRae v. McGuire, 23 Miss. 100; Beaumont v. Yeatman, 8 Humph. (Tenn.) 542; Touchard v. Crow, 20 Cal. 150. In this latter case the attestation read: "Witness my hand and seal of court affixed at office this 30th day of July, 1852. John A. Brewster, deputy clerk of Sonoma county." In Woodruff v. McHarry, 56 Ill. 218, where a deed was acknowledged before a person who described himself, in his certificate, as clerk *pro tempore* of the United States circuit court for the southern district of Illinois, it was regarded as sufficient if the person taking the acknowledgment was clerk *de facto*, without reference to the temporary character of his appointment. To same effect, Brown v. Lunt, 37 Me. 423; Prescott v. Hayes, 42 N. H. 56.

[25] Knight v. Smith, 1 Ore. 276; Jacoway v. Gault, 20 Ark. 190; Bell v. Evans, 10 Iowa 353.

[26] Stewart v. Dutton, 39 Ill. 91; Wickersham v. Reeves, 1 Iowa 413.

[27] Wells v. Atkinson, 24 Minn. 161.

proof of them a liberal construction is always allowed.[28]

Where a conveyance of lands in one state is acknowledged before a commissioner in another state, the same form must be used as if the acknowledgment were made in the state where the land is situate.[29]

§ 511. **Venue.** Express statutory requirements providing for the taking of the acknowledgment in the county where the land is situated, or where the parties reside, etc., are usually held to be mandatory, and compliance in this respect is essential to validity;[30] but ordinarily an acknowledgment may be made anywhere before an officer authorized by the laws of the state where the land is situated to take and certify the same. In every instance, however, the certificate must show on its face that it was made at some assignable locality, and within the jurisdiction of the certifying officer.[31] This is accomplished by a note of the county and state called the venue, immediately preceding the certificate proper, together with the usual "ss" or scilicet, which literally means, "let it be known," or "be it known, that in the state of ——, at the county of ——," etc. The use of the venue in legal and other writings cannot safely be dispensed with, for although technical yet it is sure and certain.

The omission of venue, where there is nothing in the certificate to show where the officer who took the acknowledgment resided and acted, is generally a fatal defect;[32] and the same is true of a partial venue if unaided by other facts.[33] It

[28] Kelly v. Calhoun, 95 U. S. 710; Henderson v. Grewell, 8 Cal. 581; Warren v. Hardy, 6 Md. 525; Alexander v. Merry, 9 Mo. 510; Barton v. Morris, 15 Ohio 408; Monroe v. Arledge, 23 Tex. 478. The omission of the statement of immaterial facts, notwithstanding they are part of a prescribed form, will not constitute a fatal defect in the certificate. Bradford v. Dawson, 2 Ala. 203.

[29] Keller v. Moore, 51 Ala. 340.

[30] Dickerson v. Talbot, 14 B. Mon. (Ky.) 49; Hughes v. Wilkinson, 37 Miss. 482.

[31] Montag v. Linn, 19 Ill. 399.

[32] Vance v. Schuyler, 1 Gilm. (Ill.) 160.

[33] Hardin v. Kirk, 49 Ill. 153. In this case the venue to the certificate was, "County of New York." The court say: "This venue may apply equally well to a county of the same name in any state of the Union. There is nothing in the deed from which it can be inferred that the acknowledgment was taken in the state of New York. It must appear from the acknowledgment where it was made and certified, or by taking the acknowledgment and the deed together we must be able to presume in what

has been held, however, that the omission of the venue in a certificate of an acknowledgment, taken by a justice of the peace, may be obviated by proof that such officer was at the time a justice of the peace in the county where it was taken, and as such took it;[34] and further, that the omission of the name of the county in the caption to a certificate otherwise formal and sufficient, where the defect was supplied by the seal attached so as to show the venue or county, only rendered the certificate informal and not void.[35]

Ordinarily a notary may exercise his office anywhere in the state of his appointment; and justices of the peace have in many instances been held to possess the same power, the act being ministerial and not judicial.[36] The theory upon which this doctrine proceeds is that the authority to perform a ministerial act attaches to the officer wherever he may be, unless restricted by statute prescribing territorial limits. Where the judicial theory of the act obtains the rule would probably be different. The presumption is that the act was performed within the officer's jurisdiction.[37]

§ 512. Date. It does not appear that a date is essential to a certificate,[38] even though the statutory form may provide for the same;[39] and where the statute requires the date to be stated, it seems that an omission in this particular may be supplied by resorting to the deed itself, or to the certificate of magistracy if any is annexed.[40]

§ 513. Party acknowledging must be sufficiently identified. The first of the two primary and indispensable elements of a certificate of acknowledgment consists of the identification of the party whose act it purports to be. The statutory pro-

state it was taken. The officer taking it can act only within the territorial limits of his jurisdiction, and it must appear that the act was performed within these limits. In this case the certificate and deed failed to show where the officer acted at the time when he took this acknowledgment, and is defective, and the deed is therefore inadmissible."

[34] Graham v. Anderson, 42 Ill. 514.

[35] Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148.

[36] Day v. Brooks, 30 Mo. 515; Biscoe v. Boyd, 15 Ark. 655; Learned v. Allen, 14 Allen (Mass.) 109; Odiorne v. Mason, 9 N. H. 30.

[37] Rackleff v. Norton, 19 Me. 274; Bradley v. West, 60 Mo. 33.

[38] Irving v. Brownell, 11 Ill. 402; Rackleff v. Norton, 19 Me. 274.

[39] Hobson v. Kissam, 8 Ala. 357.

[40] Bradford v. Dawson, 2 Ala. 203; Kelly v. Rosenstock, 15 Md. 389.

visions of all the states, however diverse they may be on other subjects connected with execution, are all united upon this point; and unless the person offering to make such acknowledgment shall be personally known to the certifying officer to be the real person who executed the deed, or shall be proved to be such by a credible witness, such officer has no authority to take or certify the acknowledgment. The evident object of these provisions is to prevent one individual from personating another,[41] and this fact of identity must affirmatively appear in the certificate. The officer must know the person in whose name the acknowledgment is proposed to be made, and must certify to such knowledge; and a substantial compliance with this requirement is indispensable to the validity of the acknowledgment.[42]

A literal compliance in this regard is not essential, however, provided the fact substantially appears,[43] and other language than that used by the statute may be employed where the import is the same.[44] Courts are always inclined to construe

[41] McConnel v. Reed, 2 Scam. (Ill.) 371.

[42] Fryer v. Rockefeller, 63 N. Y. 268; Fogarty v. Finlay, 10 Cal. 239; Gove v. Cather, 23 Ill. 634; Brinton v. Seevers, 12 Iowa 389; Garnier v. Barry, 28 Mo. 438; Pinckney v. Burrage, 31 N. J. L. 21; Smith v. Garden, 28 Wis. 685; Carpenter v. Dexter, 8 Wall. (U. S.) 513; Pendleton v. Button, 3 Conn. 406. An introduction by a mutual friend is sufficient to satisfy a statutory requirement that the officer taking the acknowledgment shall know or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the instrument, if such introduction satisfies the conscience of the officer as to the identity of the party. Wood v. Back, 54 Barb. (N. Y.) 134. A certificate of acknowledgment which fails to recite that the grantor was known to the officer, but does recite that the grantor signed in the officer's presence, is good as an attestation, though defective as an acknowledgment. Rogers v. Adams, 66 Ala. 600.

[43] Tully v. Davis, 30 Ill. 103; Rosenthal v. Griffin, 23 Iowa 263; Robson v. Thomas, 55 Mo. 581; Warner v. Hardy, 6 Md. 525.

[44] Bell v. Evans, 10 Iowa 353; Kelly v. Calhoun, 95 U. S. 710; Henderson v. Grewell, 8 Cal. 581; Thurman v. Cameron, 24 Wend. (N. Y.) 87. Where a certificate stated that "personally appeared before me P. H. and E. H., his wife, who —— personally known to me," etc., omitting "are" after "who," it was *held* that such omission did not impair the deed, as "who" might be disregarded as superfluous, and the certificate would then be correct. Hartshorn v. Dawson, 79 Ill. 108. So, where the word "appeared" was omitted after the phrase "before me personally," the omission was held to be a clerical error, and not fatal to the

matters of this kind liberally;[45] and whenever the defect can be reconciled, or does not defeat the acknowledgment by indefiniteness or uncertainty, it will not invalidate.[46]

A material omission unaided by other circumstances, or a failure to designate the person acknowledging with certainty, as where the acknowledgment purports to be made by —— Smith, without other designation of the person,[47] or where there is an entire omission of the name of the grantor, will ordinarily vitiate the certificate, although it has been held that if the certificate shows that the party who appeared before the officer was the grantor and that he and no one else made the acknowledgment,[48] or where he is referred to by name in that part of the certificate referring to the wife's acknowledgment,[49] this will be sufficient.

§ 514. Fact of acknowledgment must be stated. The second indispensable requisite to a valid certificate is a statement of the fact of acknowledgment; for not only must the identity of the parties appear, but it must further be shown that they affirmed the execution of the instrument as their free and voluntary act. But here, as in the former instance, form is not material, provided substance be found. No term, however, so fully expresses the fact as the word "acknowledge." This, by immemorial usage as well as statutory enactment, has obtained a known and established signification when used in this connection, and its employment, or words of equivalent import, is absolutely necessary to give legal effect to the certificate.[50] In the case of ancient deeds much lati-

validity of the instrument. Scharfenburg v. Bishop, 35 Iowa 60. A certificate that A., "to me well known, acknowledged," etc., was held to be substantially in the form given by statute, viz.: that A., "known to me to be the person whose name is subscribed to the foregoing instrument, acknowledged," etc. Watkins v. Hall, 57 Tex. 1.

[45] Harrington v. Fish, 10 Mich. 415.

[46] Ogden v. Walters, 12 Kan. 282.

[47] Hiss v. McCabe, 45 Md. 77.

[48] Wilcoxon v. Osborn, 77 Mo. 621. But even under such circumstances the fact of personal knowledge must appear; and a certificate which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed the deed, would be insufficient. Fryer v. Rockefeller, 63 N. Y. 268.

[49] Magness v. Arnold, 31 Ark. 103.

[50] Bryan v. Ramirez, 8 Cal. 461;

tude has been allowed, and the exceptions to the foregoing rule, if such they can be called, have mainly arisen in the construction of such instruments.[51]

§ 515. Party acknowledging must understand purport of act. As a rule, an officer who takes an acknowledgment is under no obligation to explain the deed, yet the person so acknowledging should understand the nature of his act. Hence, it has been held that a notary's certificate of acknowledgment is of little force when the person purporting to make the acknowledgment does not understand English, and the notary has not explained the effect of the act in such person's own language, and seen to it himself that it was understood.[52]

§ 516. Acknowledgment by corporation. In many, perhaps a majority, of the states, there is no statutory provision relative to the acknowledgment of deeds by corporations. In such cases the officer signing the corporate name and affixing the seal is the party executing the deed within the meaning of the statute requiring deeds to be acknowledged by the grantor.[53] In framing the certificate it should appear that the officer acknowledged the execution of the instrument as his own act and as the act of the corporation as well.

§ 517. Conveyances by married women. Notwithstanding the fact that in a majority of the states a married woman is now as free to acquire, hold and transmit real property by good and indefeasible title as her husband, it must ever be borne in mind that she has no legal existence or power to transfer her interest in lands except through the statutory channel. This channel may be broad or contracted, according to the policy of the state, and varying from time to time as impediments have been removed, but it is a groove through which her title must pass to be valid; and any departure from

Short v. Conlee, 28 Ill. 219; Cabell v. Grubbs, 48 Mo. 353; Stanton v. Button, 2 Conn. 527; Dewey v. Campau, 4 Mich. 565; Huff v. Webb. 64 Tex. 284. The formality of acknowledgment has been held to be sufficiently expressed by the term "deposes and says." Chouteau v. Allen, 70 Mo. 290. But the word "stated" has been held insufficient. Dewey v. Campau, 4 Mich. 565.

[51] See Jackson v. Gilchrist, 15 Johns. 89.

[52] Harrison v. Oakman, 56 Mich. 390.

[53] Lovett v. Saw-mill Asso. 6 Paige (N. Y.) 54; Kelly v. Calhoun, 5 Otto (U. S.) 710. A corporate deed usually bears the signatures of both the president and secretary

the course marked out by statute is to render the conveyance nugatory and without legal effect. In many instances the prescribed mode of executing the conveyance confers upon her the power to convey, and here rests the broad distinction between conveyances by married women and others who are *sui juris*. When the power exists independent of its mode of execution, and has been defectively executed, it is not a case of want of power, but of defective execution, which a court of equity will aid. But where the power and mode of execution are inseparable—the power resulting from the mode—and that mode has not been pursued, it is not a case of defective execution, but a want of power, which a court of equity cannot aid. Therefore, when a married woman attempts to convey, and lacks power from not pursuing the mode prescribed, courts will not relieve, because to amend the mode is to create the power.[54] The acknowledgment, therefore, is an essential part of a married woman's deed,[55] and not merely an authentication. The special requirements of the statute, if any, must be fully complied with, and the fact of compliance must be fully and clearly set forth in the certificate.[56] The rules of construction, however, are the same as in other cases of acknowledgment; and it will be understood that, while compliance is necessary to impart validity, the strict letter of the statute need not necessarily be followed, a substantial compliance being all that is required.[57]

By the strict rules of the common law the legal existence of the wife was merged in the husband, and she could convey her lands only by uniting with him in levying a fine, which, being a solemn proceeding of record, the judges were supposed to watch over and protect her rights, and ascertain by a private examination that her participation was voluntary. The statute relating to acknowledgments generally adopted in this

and both of these officers should, in such case, unite in the acknowledgment.

[54] Silliman v. Cummins, 13 Ohio 116; Grove v. Zumbro, 14 Gratt. (Va.) 501.

[55] Mason v. Brock, 12 Ill. 273.

[56] Landers v. Bolton, 26 Cal. 408; Lindly v. Smith, 46 Ill. 523; Chauvin v. Wagner, 18 Mo. 531; Ward v. McIntosh, 12 Ohio St. 231; Laird v. Scott, 5 Heisk. (Tenn.) 314; Johns v. Reardon, 11 Md. 465; Grove v. Zumbro, 14 Gratt. (Va.) 501.

[57] Tubbs v. Gatewood, 26 Ark. 128; Brown v. Farran, 3 Ohio 140; Thayer v. Torrey, 37 N. J. L. 339; Reynolds v. Kingsbury, 15 Iowa 283; Goode v. Smith, 13 Cal. 81; Stuart

country provided a substitute for the common-law fine, and in lieu thereof prescribed an examination and certificate by a designated officer. But while it enlarged the power of alienation it still preserved the characteristics and essential features of the ancient ceremony, and unless the wife's deed was made in conformity thereto it was inoperative to any extent or for any purpose.[58] This the courts have uniformly held; and where it appears that there has been a failure to comply with the statutory requirements the defect renders the deed void and without effect.[59]

Thus, if the statute requires that the contents of the deed shall be explained to the wife, this is essential, and a substantial compliance must be shown; and if the certificate fails to show statutory conformity by neglecting to state that the wife was made acquainted with the contents of the deed, the acknowledgment will be fatally defective.[60] So, too, the fact that her acknowledgment was voluntary and without compulsion is a matter of substance and should be shown, and a failure so to state renders the conveyance inoperative;[61] and the same is true of a failure to state that she does not wish to retract it, when this is made a necessary averment by statute.[62] If a private examination is required by statute a recital of the same becomes one of the essential features of the certificate, to omit which is to render the whole certificate valueless;[63] and generally any omission of any specially-pre-

v. Dutton, 39 Ill. 91; Pardun v. Dobesberger, 3 Ind. 389; Bernard v. Elder, 50 Miss. 336.

[58] Lane v. Dolick, 6 McLean 200; Davis v. Bartholomew, 3 Ind. 485; Stone v. Montgomery, 35 Miss. 83; Delassus v. Poston, 19 Mo. 425; Russell v. Rumsey, 35 Ill. 362.

[59] Martin v. Dwelly, 6 Wend. (N. Y.) 9; Butler v. Buckingham, 5 Day (Conn.) 492; Lane v. McKeen, 15 Me. 304; King v. Mosely, 5 Ala. 610; Landers v. Bolton, 26 Cal. 408; Lindley v. Smith, 46 Ill. 523; Wamsell v. Kern, 57 Mo. 478; Grove v. Zumbro, 14 Gratt. (Va.) 501.

[60] Pease v. Barbers, 10 Cal. 463; O'Ferrall v. Simplot, 4 Iowa 381; Silliman v. Cummins, 13 Ohio 116; Moorman v. Board, 11 Bush (Ky.) 135; Hariston v. Randolph, 12 Leigh (Va.) 445.

[61] Louden v. Blythe, 27 Pa. St. 22; Pratt v. Battels, 28 Vt. 685; Blackburn v. Pennington, 8 B. Mon. 217; Bartlett v. Fleming, 3 W. Va. 163.

[62] Grove v. Zumbro, 14 Gratt. (Va.) 501; Chauvin v. Wagner, 18 Mo. 531; Bateman's Petition, 11 R. I. 585; Landers v. Bolton, 26 Cal. 408; Linn v. Patton, 10 W. Va. 187; Belcher v. Weaver, 46 Tex. 293.

[63] Stillwell v. Adams, 29 Ark. 346; Hartley v. Ferrell, 9 Fla. 374; Jordan v. Corey, 2 Ind. 385; Ed-

scribed requirement destroys the effect of the acknowledgment and also of the conveyance which it is intended to prove.

An express relinquishment of dower is required in many states, and when such is the case an acknowledgment without this formality would be insufficient;[64] and the same is true of a release and waiver of the right of homestead when required by statute.

The tendency of recent legislation has been to abrogate most, and in some states all, of the many special features that formerly characterized the acknowledgments of married women, whether in conveyances of their own lands or when joining in the husband's conveyance. Separate examinations, as a rule, are no longer required; nor is the wife compelled to make any statements relative to her acknowledgment different from those required of other persons. A special renunciation of dower is in some cases necessary, but this is almost the only one of the old features that has been retained, and generally, where by statute a married woman is given the same contractual powers as though she were sole, her acknowledgment is not distinguishable from that of her husband.

§ 518. **Conveyances of the homestead.** The solicitude of the law to protect the family has developed a number of legal theories and lines of action somewhat at variance with generally received doctrines, when the subject-matter of a sale consists of land used and occupied as a place of residence. In this class of conveyances acknowledgment is frequently made an essential part of the deed and where both spouses are living it must be duly acknowledged by each. As a rule of conveyancing the acknowledgment should be made at or before delivery, but this is not imperative and it has frequently been held that the certificate of such acknowledgment may be added, and the acknowledgment itself may be made, at any time after signing and become effectual by relation from the date of signature, provided no rights of third parties have intervened.[65]

It would seem, however, that such acknowledgment, if made subsequent to delivery, must be made by husband and wife

gerton v. Jones, 10 Minn. 427; Rice v. Peacock, 37 Tex. 392; Garrett v. Moss, 22 Ill. 363; Russ v. Wingate, 30 Miss. 440.

[64] Lindley v. Smith, 46 Ill. 524; Thomas v. Meir, 18 Mo. 573.

[65] Nelson v. Holly, 50 Ala. 3.

during the lifetime of each other and that the usual rule which permits surviving consorts to convey to a purchaser of the fee whatever rights they might have does not apply. The question is comparatively a new one and can hardly be said to be settled, but so far as it has been passed upon the result is adverse to the validity of such a conveyance.[66] Hence, where a deed of the homestead is made by husband and wife, notwithstanding it may have been duly signed by both, yet if the wife fail to acknowledge as provided by statute, the deed will be without legal effect, and in case of the death of the husband no subsequent acknowledgment by the wife will, it seems, be effectual as against the heirs at law.[67] That such a course is to the last degree inequitable, in that it involves payment to the ancestor for lands which, notwithstanding, pass to the heirs, is admitted, but if the deed, unacknowledged by the wife at the moment of the ancestor's death was void, no other conclusion seems admissible.[68]

[66] The only case known to the writer is that of Richardson v. Iron Co. 90 Ala. 266, which sustains the doctrine of the text.

[67] See Crim v. Nelms, 78 Ala. 604.

[68] So held in Richardson v. Iron Co. 90 Ala. 266; the court further says: Upon his death his perfect title passed instantly into his heirs, the plaintiffs in this suit. With the title thus lodged in Bond's children his widow had no connection. In the lands she had no interest except in recognition of the title of the heirs. No estate then existed out of the heirs which she could convey, except by way of release to the heirs themselves. It would be an anomaly, indeed, to hold, under this state of law and fact, that the widow, thus without alienable interest of any kind or to any extent in the land, could, by the mere acknowledgment of a deed which was essentially a nullity when the heirs took a perfect title, defeat their rights, and in legal effect convey their lands into third persons. We do not think it can be done. We apprehend that the power to give vitality to such a void conveyance by after acknowledgment ceases whenever the estate, assuming the invalidity of the deed, has passed into third persons, or rights of third persons have attached to it. We cannot conceive that it can be material whether these third persons are heirs, devisees, purchasers or creditors, or whether their estates or rights have accrued by descent, devise, sale or judgment liens. The conclusion, we think, is enforced by a consideration of two clearly established propositions of law: *first*, a deed cannot be delivered after the death of the grantor; *second*, that the mere fact that a deed of the homestead, void for the lack of the wife's privy acknowledgment, is given into the possession of the nominal grantee is only a conditional delivery, and a conditional delivery, unless it be in escrow, is in legal contemplation no

§ 519. **Authentication by officer.** A certificate should be made under the hand of the certifying officer—that is, he must sign it;[69] the insertion of his name in the body of the certificate is not enough;[70] and an unsigned certificate is void even though it is attested by the officer's seal.[71] So, too, while it has been held that a seal is not essential to a valid official act unless required by express statute,[72] yet if the statute does in fact prescribe this requirement, he must affix the same.[73] In some states a deed without a notarial seal to the notary's certificate of acknowledgment is inadmissible in evidence.[74]

§ 520. **Clerical errors—Surplusage—Omissions.** Courts are ever inclined to construe clerical errors liberally; and it is the policy of the law to uphold certificates whenever substance is found, and not to suffer conveyances, or proof of them, to be defeated by technical or unsubstantial objections.[75] Surplusage on the one hand,[76] or mere clerical omissions on the other,[77] will not usually affect the validity of a certificate,

delivery at all. From these postulates, it results that the deed had never been, and could never be, delivered, and nothing that the widow could do could in any way affect the title of the heirs. Cahall v. Citizens Mut. Bldg. Asso. 61 Ala. 246; Jackson v. Leek, 12 Wend. (N. Y.) 105; Shoenberger v. Zook, 34 Pa. 24; Fisher v. Hall, 41 N. Y. 416; Fay v. Richardson, 7 Pick. (Mass.) 91; Woodbury v. Fisher, 20 Ind. 387.

[69] Carlisle v. Carlisle, 78 Ala. 542.

[70] Marston v. Brashaw, 18 Mich. 81.

[71] Clark v. Wilson, 127 Ill. 449.

[72] Harrison v. Simmons, 55 Ala. 510; Farman v. Buffam, 4 Cush. (Mass.) 260; Thompson v. Morgan, 6 Minn. 261; Commissioner v. Glass, 17 Ohio 542.

[73] Little v. Dodge, 32 Ark. 453; Buell v. Irwin, 24 Mich. 145; Bullard v. Perry, 28 Tex. 347. See Booth v. Clark, 12 Ill. 129.

[74] See Meskimen v. Day, 35 Kan. 46.

[75] Scharfenburg v. Bishop, 35 Iowa 60; Wells v. Atkinson, 24 Minn. 161; Tubbs v. Gatewood, 26 Ark. 128; Barnet v. Praskauer, 62 Ala. 486.

[76] Stewart v. Dutton, 39 Ill. 91, where it was held that, when words are inserted in a certificate of acknowledgment which is perfect without them, such redundancy does not vitiate it. Whitney v. Arnold, 10 Cal. 531.

[77] As where the word "his" was omitted before the words "free and voluntary act" (Dickerson v. Davis, 12 Iowa 353); or the word "appeared," which should have followed "personally," etc. (Scharfenburg v. Bishop, 35 Iowa 60); or the word "are" before "personally known," etc. Hartshorn v. Dawson, 79 Ill. 108. So, also, where the certificate omits the name of the grantor, but shows that the party

provided they do not amount to matters of substance which cannot be supplied from the context. Nor will defective grammatical expressions,[78] or the transposition of words—evidently the result of inadvertence[79]—be permitted to defeat the acknowledgment or impair the deed. An evident omission from the certificate may be supplied by correction where the omission consists of obvious words.[80]

Yet as nothing is presumed in favor of an official certificate, which must state all the facts necessary to a valid official act,[81] an omission of anything that gives substance to the certificate will be fatal to its validity. Courts have no authority to presume that substantial requirements of the statute have been complied with any further than the certificate affirmatively shows. Hence, if the omission is material, construction cannot aid it.[82]

§ 521. **Proof of official character.** The acknowledgment must not only be made before some person authorized to take the same, but the proof of his official character should in some way be apparent upon the certificate or some other paper thereto annexed. If the lands conveyed are within the certifying officer's jurisdiction, extraneous evidence of his authority is not ordinarily required, particularly if he is an officer possessing or authorized to employ a seal, and the same has been attached to his certificate. If the instrument is proved without the state, a certificate of magistracy as well as conformity must ordinarily accompany the certificate, although

who appeared before the officer was the grantor, this has been held sufficient. Magness v. Arnold, 31 Ark. 103. None of said omissions were matters of substance.

[78] As "his" for "its" (Frostburg Assoc. v. Brace, 51 Md. 508), or alluding to a "deed" as a "mortgage." Ives v. Kimball, 1 Mich. 308.

[79] As where the word "husband" was written for "deed," in the clause reading "the contents and meaning of said husband were fully explained and made known to her." Calumet Co. v. Russell, 68 Ill. 426; and see Quinby v. Boyd, 8 Cal. 194.

[80] Ralston v. Moore, 83 Ky. 571.

[81] Wetmore v. Laird, 5 Biss. (C. Ct.) 160; Hartshorn v. Dawson, 79 Ill. 108.

[82] As where the word "known" was omitted, it was held that the omission was fatal. Tully v. Davis, 30 Ill. 103. An acknowledgment of a deed purporting to be made by —— Murray, without other designation of the person making the acknowledgment, was held insufficient to convey the title of the land. Hiss v. McCabe, 45 Md. 77.

this is a matter almost wholly statutory, and the statutes of the states are not uniform in their requirements.

A certificate, properly drawn, should in some manner disclose the official title of the person making it; and so important does this appear that the statute, in almost every instance of a prescribed form, has made provision for the insertion of the officer's title in the body of the certificate. But while official character is usually shown in this manner it may be sufficiently indicated by the addition of the title of office to the signature.[83] So, on the other hand, it has been held that the omission of official designation in the signature is immaterial, provided the character is disclosed in the body of the certificate.[84] This would be particularly true where a certificate of magistracy accompanies the certificate.[85]

While the certificate must in some manner purport to have been made by an officer authorized by law to take acknowledgments and proofs of deeds, yet it is not necessary, unless there is a statutory requirement to that effect, that the officer should state in his certificate that he is authorized so to do,[86] the certificate itself being an evidence of that fact.[87]

Even when proof of official character is required, where acknowledgments are taken without the state by officers authorized to take the same, the rule does not extend to commissioners of deeds appointed by the proper authorities of the state for this purpose, and no proof of authority is required in such cases beyond the ordinary method of authentication.[88]

Where acknowledgments are taken in a foreign country before an officer unknown to the law of the state where the land is situated, proof of authority and official character must be made to render the act valid; and a certificate of magistracy, and in proper cases of conformity, must accompany the certificate of acknowledgment.[89]

The same rules which apply to the description and designation of parties apply to the officers making the certificate, and

[83] Russ v. Wingate, 30 Miss. 440.

[84] Brown v. Farran, 3 Ohio 140; Colby v. McOmber, 71 Iowa 469.

[85] Final v. Backus, 18 Mich. 218.

[86] Livingstone v. McDonald, 9 Ohio 168.

[87] Thompson v. Morgan, 6 Minn. 292; Thurman v. Cameron, 24 Wend. (N. Y.) 87; Harding v. Curtis, 45 Ill. 252.

[88] Smith v. Van Gilder, 26 Ark. 527.

[89] De Segond v. Culver, 10 Ohio 188.

verbal inaccuracies or manifest clerical errors are not material where the substance is correct.[90]

[90] Thus, an acknowledgment before "a" clerk of the county court within and for a certain county, *held*, there being but one clerk of that court, sufficient to authorize the presumption that the acknowledgment was taken before "the" clerk. Walker v. Owens, 25 Mo. App. 587.

CHAPTER XXI.

REGISTRATION.

§ 522. General principles.
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§ 522. General principles. Registration has been held to be a substitute for livery of seizin, and to give to the conveyance the notoriety intended to be effected by that ancient ceremony. In all its essential features, however, the system of registration practiced in the United States is original and peculiar to the country of its inception and development. It is entirely unknown to the common law, and in all respects a creation of the statute. It is thought to have been derived from the English statute of enrollments, which was enacted to counteract the evil effects resulting from the practice of secret conveyances under the statute of uses.[1] The enrolling of a deed did not, however, make it a record, but only a memorial. The American system of registration not only serves as a means of preservation of the muniments and evi-

[1] This statute provided that every bargain and sale of an inheritance or freehold should be by deed indented and enrolled within six lunar months from its date, either in one of the courts of Westminster, or before the justices and clerk of the peace in the county where the lands were situate. This statute, however, only provided for the enrollment of one class of deeds, to-wit: those of bargain and sale, and as it did not affect other kinds of deeds its object was soon evaded by the employment of other methods of transfer. The conveyance by lease and release, which required no enrollment, was for many years the principal form employed.

dences of title, whereby the instrument, as under the English statute, shall be "kept in memory," but gives to them, when properly executed, certified and transcribed in conformity to law, the dignity and effect of public records; and to the system much of the permanency and stability of our land titles is attributable.

§ 523. **Effect of registration.** The operation and effect of registration is primarily a matter of statutory regulation, and in all of the states enactments defining and declaring the effect of a properly-recorded instrument are in force. In general such enactments provide that every instrument executed and certified in the manner prescribed by statute shall, from the time of filing the same for record,[2] take effect as against creditors and subsequent purchasers without notice, and in some instances are declared to impart notice, to all persons interested, of the contents thereof. So, too, it was formerly held to be the rule, derived from a construction of such statutes, that every deed properly certified and recorded afforded constructive notice to the world; but this rule, according to later decisions, has been held to be too broad an enunciation of the doctrine. Such record is now generally held to be constructive notice only to those who are bound to search for it —as subsequent purchasers or mortgagees, and perhaps all others who deal with or on the credit of the title in the line of which the recorded deed belongs.[3] But strangers to the title—persons claiming adversely—are in no way affected by such record.[4]

§ 524. **What instruments must be recorded.** As registration is solely a matter of statutory creation, the rules and analogies of the common law have little application; yet as the statute, in most instances at least, has made no specific designation of the class of titles or estates to be thus protected and preserved, recourse must be had to cases of judicial interpretation. The substance of the usual provision is that deeds, mortgages, powers of attorneys and other instruments relating to or affecting the title to real property shall be

[2] Johnson v. Borden, 40 Vt. 567; Kessler v. State, 24 Ind. 213; Leslie v. Hinson, 83 Ala. 266.

[3] Jenkins v. Adams, 71 Tex. 1.

[4] Maul v. Rider, 59 Pa. St. 167; Corbin v. Sullivan, 47 Ind. 356; Gillett v. Gaffney, 3 Colo. 351; Carbine v. Pringle, 90 Ill. 302.

recorded in the county in which such property is situated, or, if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.[5]

Upon general principles this would include every right, claim or interest in land; and indeed such is its effect and import whenever the right, claim or interest is of a permanent character. Thus, a deed granting a permanent right of way is within the recording acts, and unless recorded cannot operate against subsequent purchasers for value and without notice.[6] A bond for conveyance is subject to the same rule,[7] and the assignment of such a bond has been held to come clearly within the provisions of the registration act; and unless so recorded such assignment will not take effect as against a subsequent *bona fide* purchaser or incumbrancer without notice.[8]

It would seem, however, that the statute requiring deeds or other evidences of conveyance to be recorded does not apply to leases for years,[9] nor to mortgages of such leasehold estates.[10]

§ 525. **Equities and equitable interests.** Notwithstanding that the earlier cases announced a different rule, the general doctrine now is that equitable estates and interests as well as legal are embraced within the intent and operation of the recording acts,[11] and where an instrument is properly recordable, and due regard has been had to all the preliminaries of execution, acknowledgment, etc., the record of the same becomes constructive notice not only that the instrument exists, but of its contents, and of whatever rights, interests or estates, either legal or equitable, that may be created by or arise from its provisions.

[5] A deed recorded in a county where at the time the land is shown by a legal establishment of county lines to be, is sufficiently recorded notwithstanding a change which excludes the land from that county. If, however, the county lines have not been established at the time of the record, the person recording acts at his peril. Jones v. Powers, 65 Tex. 207.

[6] Prescott v. Beyer, 34 Minn. 493; Worley v. State, 7 Lea (Tenn.) 382.

[7] Welles v. Baldwin, 28 Minn. 408; Dobyns v. Waring, 82 Va. 159.

[8] McFarran v. Knox, 5 Cal. 217.

[9] Hodge v. Giesse, 43 N. J. Eq. 342.

[10] Hutchinson v. Bramhall, 42 N. J. Eq. 372.

[11] Tarbell v. West, 86 N. Y. 287; Wilder v. Brooks, 10 Minn. 50; Digman v. McCallum, 47 Mo. 372;

Thus, the registry of a mortgage is of itself notice in law to all subsequent purchasers of the lien created thereby. So, also, the record of a trust deed affords notice to every one of the existence and terms of the trust; and it seems that the registry of a mere equitable mortgage or incumbrance is notice to a subsequent purchaser of the legal estate so as to entitle such mortgage to a preference.[12]

§ 526. **Forged instruments.** The provisions of the recording acts have no application to forged deeds and other instruments, for they have no effect upon the title and are not entitled to record. However innocently one may have purchased under such recorded deed, he has no rights against the true owner of the land.[13]

§ 527. **Governmental conveyances.** Provision is generally made in those states which contain lands belonging to the federal government for the registration of duplicate receipts and other evidences of purchase, as well as for the deeds and patents which may follow; yet the registration laws of the state do not apply to the disposition of lands belonging to the United States, but the rights of parties will be governed by the regulations established by congress until the title has finally passed from the government.[14]

§ 528. **Prerequisites of registration.** The whole system of registration of conveyances, as well as the effect thereof, is purely statutory, and in its practical operation somewhat in derogation of common-law principles. By the statute certain formalities are frequently required, which in the main relate to execution and the means of proof; and the due observance of these formalities is usually made essential to the giving of constructive notice, and in some instances to the right to

Alderson v. Ames, 6 Md. 52; Worley v. State, 7 Lea (Tenn.) 382.

[12] Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394.

[13] Where a person took a deed to one of his sons, and also to a grandson of the same name as his own except the addition of a middle initial letter, the grantees being minors, and the grandfather, the custodian of such deed, after the death of his son, one of the grantees, erased his name and the middle initial in the other grantee's name from the deed, and put the deed so altered and changed on record, thereby showing a conveyance to himself, the grandfather, *held*, that the erasure was a forgery, and as such did not affect the title of the real grantees. Pry v. Pry, 109 Ill. 466.

[14] David v. Rickabaugh, 32 Iowa 540; Betser v. Rankin, 77 Ill. 289.

record. Where a statute provides that, as a prerequisite to registration, a deed shall be acknowledged before some duly-authorized officer, the mere recording of a deed not acknowledged in accordance with the statute does not impart constructive notice to any one of the contents of such deed.[15] So, also, it has been held that a deed is not entitled to be recorded where it does not appear, except inferentially from the seal, of what city, county or state the notary was who attempted to take the acknowledgment.[16]

§ 529. **Registration as affected by defective execution.** The rule is general that a defectively acknowledged deed or a deed without acknowledgment, although recorded, will not impart constructive notice to subsequent purchasers for a valuable consideration;[17] and it has further been held that if it is so recorded without acknowledgment, the record is not admissible as evidence of title in an action to recover the lands so conveyed.[18] The rule is more strictly applied in some states than in others; and it has been held that even where instruments purport to have been acknowledged, if such acknowledgments were defectively made, or if the certificates thereof fail to embody all the statutory requirements in a substantial manner, the effect of registration is practically the same as though no acknowledgment had been made.[19]

In some states where the deed is so defectively executed as to pass no estate, it is by law excluded from registration; but generally this effect follows only from non-compliance with the statute in respect to acknowledgment.[20]

[15] Bishop v. Schneider, 46 Mo. 472; Galway v. Malchon, 7 Neb. 285; Westerman v. Foster, 57 Ind. 408; Pope v. Henry, 24 Vt. 560; McMinn v. O'Connor, 27 Cal. 238; Holliday v. Cromwell, 26 Tex. 188; Reynolds v. Kingsbury, 15 Iowa 238.

[16] Nor does the index of such a deed charge with constructive notice of its contents. Greenwood v. Jenswold, 69 Iowa 53; and see Schults v. Moore, 1 McLean (C. Ct.) 520; McMinn v. O'Connor, 27 Cal. 238.

[17] Cox v. Wyat, 26 W. Va. 807; Woolfolk v. Graniteville Mfg. Co. 22 S. C. 332; Bishop v. Schneider, 46 Mo. 472; Galway v. Malchon, 7 Neb. 285; Herndon v. Kimball, 7 Ga. 432; Carter v. Champion, 8 Conn. 549.

[18] Westerman v. Foster, 57 Ind. 408.

[19] See Greenwood v. Jenswold, 69 Iowa 53; Cox v. Wyat, 26 W. Va. 807.

[20] See, generally, Burnham v. Chandler, 15 Tex. 441; Galpin v. Abbott, 6 Mich. 17; Pringle v.

The rule as stated, while undoubtedly that which prevails in a majority of the states where it is expressed and declared by statute, has in several instances been denied, while the statutes of some of the states have adopted a different policy with regard to the effect of registration. By the language of these statutes everything is comprehended that may relate to or affect title, and every such instrument may be recorded without any qualification as to whether they be sufficient in law to effectuate the object purported on their face.[21] While the states holding this doctrine are in the minority, it would still seem that they are supported by the better reason. The primary object of registration is, or should be, to make the records the great depositories of land titles of the states; and for that reason every instrument in writing relating to land should have the privilege of record, and, when once recorded, should impart notice to the world of everything therein stated as well as of everything that may be necessarily implied from the words of such recorded instruments. Acknowledgment is nowhere held essential to the validity of deed as between the parties; and as a rule the statute relating to acknowledgments only goes to the extent of providing that, if a deed be acknowledged and certified in the manner prescribed, the original may be read in evidence without other proof of its execution. To say, therefore, that the record of an unacknowledged deed is a nullity seems a perversion of the plain intent of the law; yet the fact remains that this anomaly exists in many of the states, either by express enactment or judicial construction.

A deed, though not entitled to record, but which has been recorded, while it does not operate as constructive notice, may operate as actual notice;[22] and a person searching the records may be bound by the information there obtained when he has actually inspected an instrument purporting to affect the title under investigation.

§ 530. Effect of imperfect description. To charge a purchaser with notice as to any particular tract of land, such

Dunn, 37 Wis. 449; Monroe v. Hamilton, 60 Ala. 227; Parret v. Shaubhut, 5 Minn. 323; Reed v. Coale, 4 Ind. 283.

[21] See Morrison v. Brown, 83 Ill. 562; Brown v. Simpson, 4 Kan. 76.

[22] Musgrove v. Bonser, 5 Ore. 313; Bass v. Estill, 50 Miss. 300; Hastings v. Cutler, 24 N. H. 481.

land should be so described as to render its location definite and certain. The general subject of description has been so thoroughly discussed in other parts of this work that no attempt at recapitulation will here be made; yet, as an example of what is meant, it may be said that a conveyance of lands without description of boundary or location, but merely as "all other lands owned by the vendor in the state of Louisiana," while it might operate as between the parties, is not notice as to any particular tract conveyed.[23] The effect of registration as notice is generally held to be the tenor and effect of the instrument as it appears upon the record;[24] and while the authorities are divided in regard to errors which may intervene in transcribing, if the instrument is correctly spread upon the records the only notice it affords is of its contents.[25]

§ 531. **Failure to record by recording officer.** As to the effect of a failure by the recording officer to properly record or transcribe an instrument left with him for that purpose, the authorities are not agreed. It is held in some states that a purchaser of land who deposits his deed for record discharges thereby his whole duty to the public. If, through the fault of the register, the deed is not recorded, such failure will not prejudice the purchaser, even in favor of a subsequent purchaser without notice, unless the first purchaser, after knowledge of the defect in the record, is guilty of laches in failing to give notice of his title.[26]

§ 532. **Effect of erroneous registration.** There is a marked difference of opinion among courts and jurists with regard to the effect of an error in transcription after an instrument has been properly lodged in the office of registration. Upon the one hand it is held that the records are constructive notice only of that which they actually disclose, and that purchasers have a right to rely upon the records as indicating the true state of the title; and that where a purchaser, having duly examined the records, purchases with the knowledge thereby

[23] Green v. Witherspoon, 37 La. Ann. 751.

[24] Shepherd v. Burkhalter, 13 Ga. 443; Stevens v. Hampton, 46 Mo. 404; Miller v. Bradford, 12 Iowa 14; Pringle v. Dunn, 37 Wis. 465; Barrows v. Baughman, 9 Mich. 213.

[25] Terrell v. Andrew County, 44 Mo. 309.

[26] Lee v. Bermingham, 30 Kan. 312; and see Perkins v. Strong, 22 Neb. 725.

obtained, he will be unaffected by any error or discrepancy that may have intervened through the acts of the recording officer in transcribing the instruments.[27] The theory of this class of cases proceeds largely upon the old and well-settled law of notice, and that the essential character of the registry is to quiet and confirm titles, the statutes creating the same being intended for statutes of repose. Under them a purchaser is under no obligation to ascertain that the instruments have been correctly copied, and the burden of seeing that their deeds have been properly recorded devolves on the original grantees.[28] It is contended in support of this doctrine that the statute providing that a deed shall impart notice from the time it is filed for record applies only where its contents have been correctly spread upon the records;[29] that it was never intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty.[30] It must be admitted that there are strong grounds upon which to maintain this doctrine; and these grounds are not only fortified and supported by the special reasons given, but by the general principles of law as well. The uncertainty that must attend sales of real property if the purchaser cannot rely upon the records, but must first trace up the original deed to see that it is correctly recorded, is manifest, while upon general principles the obligation of giving notice should rest upon the party holding the title, and who, if he fails in this duty, should suffer the consequences, and not an innocent party.

The opposite view is taken by a large and apparently well-considered class of cases, in which it is held that a grantee who files his deed for record with the proper officer has discharged the only duty which the law imposes upon him, and that from thenceforth his deed imparts notice and will prevail,

[27] Gilchrist v. Gough, 63 Ind. 576; Miller v. Bradford, 12 Iowa 14; Hill v. McNichol, 76 Me. 314; Pringle v. Dunn, 37 Wis. 449 ; Thorp v. Merrill, 21 Minn. 336; Chamberlain v. Bell, 7 Cal. 292; Terrell v. Andrew Co. 44 Mo. 309; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Bernard v. Campau, 29 Mich. 162; Potter v. Dooley, 55 Vt. 621; Speer v. Evans, 47 Pa. St. 141.

[28] Mutual Life Ins. Co. v. Dake, 87 N. Y. 263.

[29] Terrell v. Andrew County, 44 Mo. 309.

[30] Terrell v. Andrew County, 44 Mo. 309.

notwithstanding its contents have not been correctly transcribed. Should a subsequent purchaser be misled thereby to his injury, his only remedy is against the recording officer who has thus neglected his duty.[31] It is contended that the state, having provided the place and means of registration, and invited a grantee to deposit his deed for record, must afterward see to it that the work is properly performed; that the grantee is not a guarantor of compliance by the recording officer with the law as to recording, and that if any one suffers from the negligence of the officer he must seek redress from the officer.[32]

§ 533. **Instruments recorded in wrong book.** The methods of registration are very similar throughout the United States, and from motives of convenience it is customary in most states to employ two sets of books: one designed for deeds or all classes of absolute conveyances, and one for mortgages or conveyances subject to defeasance. Where such practice prevails, and where the law directs that deeds and conveyances of absolute interests shall be recorded in the "books of deeds," it would seem that the record of a deed in a book of mortgages is wholly inoperative so far as respects its capacity to furnish constructive notice,[33] and that a mortgage recorded in a book of "deeds" is subject to the same rule.[34]

§ 534. **Index entries.** While the index is not, properly speaking, a part of the records, index entries are, however, frequently held sufficient to charge notice;[35] and that, too, even though no description of the property is entered, but simply the words "see record,"[36] or "certain lots of land;"[37] for if enough is shown, it is claimed, to induce inquiry and put a prudent man on guard, notice is thereby afforded. In some

[31] Oats v. Wall, 28 Ark. 244; Merrick v. Wallace, 19 Ill. 486; Lee v. Bermingham, 30 Kan. 312; Mims v. Mims, 35 Ala. 23; Mangold v. Barlow, 61 Miss. 593; Brooke's Appeal, 64 Pa. St. 127; Nichols v. Reynolds, 1 R. I. 30; Throckmorton v. Price, 28 Tex. 605.

[32] Mangold v. Barlow, 61 Miss. 597.

[33] Leech's Appeal, 44 Pa. St. 140; Colomer v. Morgan, 13 La. Ann. 202; Grinstone v. Carter, 3 Paige (N. Y.) 421.

[34] Fisher v. Tunnard, 25 La. Ann. 179; James v. Morey, 2 Cow. (N. Y.) 246; Calder v. Chapman, 52 Pa. St. 359.

[35] Disque v. Wright, 49 Iowa 541; Sinclair v. Slawson, 44 Mich. 123; Swan v. Vogel, 31 La. Ann. 38.

[36] White v. Hampton, 13 Iowa 260.

[37] Bostwick v. Powers, 12 Iowa 456.

states the index would seem to be an essential part of the records, and, in such states, it has been held that a deed, in order to furnish constructive notice, must not only be transcribed upon the records, but also be properly indexed.[38]

§ 535. **Failure to index.** In the strict and proper acceptation of the term a deed is properly recorded when it has been spread upon the public records. An index is at best but a convenient method providing for pointing out or indicating where the record may be found. Its office is to facilitate search, and to afford a convenient aid to those having occasion to examine the records.[39] Properly speaking it forms no part of the records.[40] The duty of keeping proper indices usually devolves on the recorder by virtue of the statute, and they are ordinarily a part of the designated books of his office; but even while it may be the duty of the recorder to keep a proper index of his books of registration, so that one searching the records may easily find what is or is not contained therein, yet, as a rule, an instrument properly filed and copied on the records is recorded within the meaning of the law, and imparts notice to subsequent purchasers, notwithstanding the failure of the recording officer to index it.[41]

§ 536. **Deed withdrawn after filing.** The rule as to the time when a deed becomes effective as notice after filing is not altogether uniform, but in a majority of the states a deed imparts notice of its contents from the time the same is filed for record. But where after a deed has been duly filed, and before registration, it is withdrawn by the party taking a beneficial interest under it, a complicated question is raised as to its effect. It was held in one case that during the time the deed was away from the office, the law making the filing of a deed for record notice to subsequent purchasers was suspended, yet that a statement of the fact of filing and withdrawal was sufficient to put upon inquiry a third party who

[38] Ritchie v. Griffith, 1 Wash. 429.

[39] Green v. Garrington, 16 Ohio St. 548.

[40] Bishop v. Schneider, 46 Mo. 472; Stockwell v. McHenry, 107 Pa. St. 237; Chatham v. Bradford, 50 Ga. 327; Curtis v. Lyman, 24 Vt. 338. A different rule seems to prevail in Iowa. See Howe v. Thayer, 49 Iowa 154, and in Washington, see Ritchie v. Griffith, 1 Wash. 429.

[41] Bishop v. Schneider, 46 Mo. 472; but see cases last cited.

proposed to purchase the property.[42] In another case, where a deed was withdrawn before actual registration, it was held that the noting of it on the books of the recorder was evidence of the filing, but that by its withdrawal its priority was lost, and that it would only take effect from the date of its return to the registry.[43]

§ 537. **Priority.** While it is undoubtedly true that an unrecorded deed will pass to the grantee all the title of the grantor, and as between the parties is effectual for all purposes, yet, for the purposes of the recording acts, and in furtherance of the peculiar doctrine of constructive notice which forms one of their chief characteristics, in a conveyance of lands the absolute title may be said to rest with the grantor and his heirs, in a sort of abeyance, to vest irrevocably only upon the recording of the deed; and it will vest in the first grantee in condition to receive the grant who shall place his deed upon record.[44] In effect, therefore, so far as the rights of third parties are concerned, registration is a necessary incident to perfect the title of the land intended to be conveyed.[45]

But the rule of law which allows a subsequent recorded deed, made on a valuable consideration, to take precedence of a prior unregistered deed only applies when both parties claim under the same grantor,[46] and where the party who seeks the protection of the statute has acted in good faith.[47] One who has notice of the equities of prior purchasers before he pays the purchase price of land cannot claim the rights of a *bona fide* purchaser; and so a conveyance, though duly recorded, passes no title whatever when taken with a knowledge of the existence of an unrecorded deed,[48] or at best the land in the hands of such purchaser is subject to the rights of the grantee named in such prior deed.[49]

The protection of the recording acts, which declare an

[42] Lawton v. Gordon, 37 Cal. 202. In this case a deed was filed in the recorder's office for record, but before it was recorded it was withdrawn by the purchaser, and after some time returned for record.

[43] Hickman v. Perrin, 6 Coldw. (Tenn.) 135.

[44] Youngblood v. Vastine, 46 Mo. 239; Hutchinson v. Harttman, 15 Kan. 133.

[45] Respass v. Jones, 102 N. C. 5.

[46] Rodgers v. Burchard, 34 Tex. 441.

[47] Musgrove v. Bonser, 5 Ore. 313.

[48] Musgrove v. Bonser, 5 Ore. 313; Keen v. Schnedler, 92 Mo. 516.

[49] As where a purchaser takes

unrecorded deed void as against a subsequent purchaser in good faith and for a valuable consideration whose deed shall be first recorded, is not confined to a subsequent purchaser immediately from the same grantor, but applies to one who takes from him through mesne conveyances; and they protect him, if a purchaser in good faith and for value, although the intermediate grantees were chargeable with bad faith or paid nothing.[50] But a purchaser from one who bought with notice of a prior unrecorded deed given by his grantor to a third person has constructive notice of such prior deed, if it be recorded before the execution of his conveyance; and he is not a purchaser in good faith, although the deed to his grantors may have been recorded before the record of such prior deed. The prior deed in such a case will take precedence.[51]

A quitclaim deed received in good faith and for a valuable consideration, and which is recorded before a prior deed of bargain and sale, will generally prevail over such prior deed.[52]

§ 538. **Destruction of record.** The doctrine of constructive notice has been productive of several seeming anomalies, principal among which is the effect to be given to records which, having once been properly made, are subsequently destroyed. The current of authority seems to hold that a grantee discharges every legal duty when he files his deed for record, and that after a deed has been duly recorded the partial or total destruction of the record in no manner affects the constructive notice afforded by its being recorded.[53] The rule must sometimes be productive of hardship, but it seems to have been adopted under a choice of difficulties.

§ 539. **Unrecorded instruments.** Notwithstanding the positive and unqualified statements of the recording acts, intending purchasers are still held in equity to a strict exercise of good faith, and a diligent inquiry as to all matters brought to their notice which may affect or impair the title of the prop-

with actual knowledge of a prior, adverse but unattested conveyance which his counsel erroneously told him was invalid. Gilbert v. Jess, 31 Wis. 110.

[50] Fallass v. Pierce, 30 Wis. 443; Roll v. Rea, 50 N. J. L. 264.

[51] Mahoney v. Middleton, 41 Cal. 41.

[52] Graff v. Middleton, 43 Cal. 341; Marshall v. Roberts, 18 Minn. 405; Munson v. Ensor, 94 Mo. 504.

[53] Myers v. Buchanan, 46 Miss. 397; Steele v. Boone, 75 Ill. 457;

erty which forms the subject-matter of the sale. If at the time of making his contract a purchaser has notice of a prior unrecorded deed, he is regarded as acting in bad faith; and neither the principles of justice nor the policy of the law will allow him to avail himself of his priority of record to supersede the claims of a *bona fide* purchaser and permit him to triumph in his fraud.[54] No principle of the law of notice seems to be better or more firmly established than this; and, so far as the practical application of the rule is concerned, it makes no difference whether the unrecorded instrument confers a legal right or a mere equity. Hence, the purchase of land with full knowledge of the fact that the vendor has contracted to convey to another subjects the purchaser to the rights and equities of the claimant under the contract.[55]

It is difficult, however, to lay down a general rule as to what facts will in every case be sufficient to charge a party with notice, or put him on inquiry as to whether a prior deed has been made. The information received must be of that character that a prudent person, by the exercise of reasonable and ordinary diligence, could upon inquiry and investigation arrive at the fact of the existence of such prior conveyance.[56] It has been held that whatever is notice enough to excite attention and put a party on his guard and call for inquiry is notice of everything to which such inquiry might have led; and every unusual circumstance is a ground of suspicion and prescribes inquiry.[57]

Bare suspicion of title in another will not be sufficient to raise an inference of fraudulent intent;[58] but where a party has heard of a sale of the land before he purchased, and from a source entitled to reasonable credit, and under circumstances not likely to be forgotten, it seems a duty would devolve upon him of tracing out the matter and ascertaining

Gammon v. Hodges, 73 Ill. 140; Armentrout v. Gibbons, 30 Gratt. (Va.) 632; Houston v. Blythe, 71 Tex. 719; Crone v. Dameron, 98 Mo. 567.

[54] McConnel v. Reed, 4 Scam. (Ill.) 117; Claibourne v. Holmes, 51 Miss. 146.

[55] Glover v. Fisher, 11 Ill. 606.

[56] Chicago v. Witt, 75 Ill. 211.

[57] Russell v. Rauson, 76 Ill. 167; and see Gardner v. Early, 72 Iowa 518.

[58] McConnel v. Reed, 4 Scam. (Ill.) 117. The mere fact that a purchaser of land some time before his purchase had an interview with his grantor, who informed him that at that time he was not able to make a marketable title, but in a

its truth.[59] It is not necessary that actual notice of the existence of a deed, as used in contradistinction to the constructive notice given by a record, should be proved by direct and positive evidence that the subsequent purchaser actually knew that such deed was in existence. The fact of notice may be proved, like any other fact, by any proper evidence, direct or circumstantial.[60]

But while an unrecorded deed, as a general rule, is void as against a subsequent deed taken in good faith and duly recorded, the question seems to be involved in some doubt where the subsequent deed is a mere quitclaim of such interest as the grantor may have.[61] The subject of quitclaims has been a theme of great diversity of opinion in the United States, and productive of a number of contradictory decisions; but the volume of authority seems to hold that a purchaser by quitclaim is not to be distinguished from a purchaser by bargain and sale or with warranty, unless there is something in the deed to put the purchaser on notice.[62]

§ 540. Continued—As between the parties. As between the purchaser of land and his vendor, it is of no importance that the deed of conveyance be recorded;[63] and the same rule holds good between the holder of the first conveyance and a subsequent purchaser from the same vendor, where the latter has notice of the prior deed, or when his purchase is not for a valuable consideration.[64]

short time he would be, is not sufficient to give the purchaser notice of the existence of an adverse unrecorded deed to the same land. Chicago v. Witt, 75 Ill. 211.

[59] Cox v. Milner, 23 Ill. 476.

[60] Maupin v. Emmons, 47 Mo. 304.

[61] See "Quitclaim deeds," *ante*.

[62] On the question as to whether an unrecorded deed would be void where the subsequent deed was a mere quitclaim of such interest as remained in the grantor, and followed sundry mesne conveyances to persons who were affected by notice of the first grantee's equities, the court in De Veaux v. Fosbender, 57 Mich. 579, was equally divided. In Wisconsin a quitclaim deed is a conveyance, which, when recorded, protects the grantee against a prior unrecorded warranty deed. Cutler v. James, 64 Wis. 173. To the same effect, Strong v. Lynn, 38 Minn. 315; where a quitclaim deed is held to stand on the same footing as all other original conveyances. See also, Brown v. Oil Co. 97 Ill. 214; Fox v. Hall, 74 Mo. 315; Hoyt v. Ketcham, 54 Conn. 60.

[63] Dozier v. Barnett, 13 Bush (Ky.) 457; Raines v. Walker, 77 Va. 92; Jackson v. West, 10 Johns. (N. Y.) 466; Keen v. Schnedler, 92 Mo. 516.

[64] Maupin v. Emmons, 47 Mo. 304.

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